87-131

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

SIERRA CLUB,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

SIERRA CLUB,

Petitioner,

v.

MONOCHEM, INC.,

Respondent.

SIERRA CLUB,

Petitioner,

v.

COPOLYMER RUBBER AND CHEMICAL CORP. *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Did the court below err in holding that a federal court lacks jurisdiction to hear a citizen suit under the Clean Water Act against a defendant that violated its discharge permit both before and after commencement of the action, on the ground that such defendant is not "in violation" of its permit when the action was filed, contrary to the Fourth Circuit in *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), and the First Circuit in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corporation*, 807 F.2d 1089 (1st Cir. 1986)?

PARTIES TO THE PROCEEDINGS

Petitioner and plaintiff-appellant below is Sierra Club, a non-profit corporation organized under the laws of the State of California.* Respondents and defendant-appellees below are Copolymer Rubber & Chemical Co., Allied Corp., Bercen, Inc., Formosa Plastics Corp., Monochem, Inc., and Shell Oil Co.

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* Statement pursuant to Supreme Court Rule 28.1: Petitioner has no subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
PERTINENT STATUTORY PROVISION	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
I. The Decision Below Directly Conflicts With the Decisions of the Fourth Circuit in *Gwaltney* and the First Circuit in *Pawtuxet Cove.*	11
A. The Interpretation by the Court Below of the Citizen Suit Provision is Directly Contrary to those of the Fourth Circuit in *Gwaltney* and the First Circuit in *Pawtuxet Cove.*	13
B. The Court Below Adopted a View of the Role of the Citizen Suit Provision Contrary to the Views of the Fourth and First Circuits.	25
C. The Decision Below Cannot Be Reconciled With the Decisions of the Fourth and First Circuits.	27
II. The Question Over Which the Fifth Circuit Has Split With the Fourth and First Circuits is Important and Recurring.	28
CONCLUSION	29
APPENDIX:	
Opinion of Court of Appeals	App. 1
Complaint in *Sierra Club v. Shell Oil Company*	App. 17
Opinions of District Courts	App. 26

TABLE OF AUTHORITIES

Cases	Page
Bob Jones University v. United States, 461 U.S. 574 (1983)	19
Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Bethlehem Steel Corp., 608 F. Supp. 440 (D.Md. 1985)	21
Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986), *cert. granted*, — U.S. —, 107 S.Ct. 872 (U.S. Jan. 12, 1987) (No. 86-473)	*passim*
Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Job Plating Co., 623 F. Supp. 207 (D.Conn. 1985)	21
EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976)	20, 21
Hamker v. Diamond Shamrock Chemical Corp., 756 F.2d 392 (5th Cir. 1985)	*passim*
Illinois v. Outboard Marine Co., 680 F.2d 473 (7th Cir. 1982)	17
Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089 (1st Cir. 1986), *petition for cert. filed* (U.S. March 17, 1987) (No. 86-1562)	*passim*
Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F. Supp. 1013 (M.D.La. 1985)	26
Sierra Club v. Shell Oil Company, 817 F.2d 1169 (5th Cir. 1987)	*passim*
Student Public Interest Research Group v. Monsanto Co., 600 F. Supp. 1479 (D.N.J. 1985)	22
Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975)	22
United States v. Amoco Oil, 580 F. Supp. 1042 (W.D.Mo. 1984)	22

TABLE OF AUTHORITIES—Continued

Page

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) 17, 21

United States v. Ward, 448 U.S. 242 (1980), *reh'g denied*, 448 U.S. 916 (1980) 21

Weyerhaeuser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) 12, 21, 22

STATUTES

28 U.S.C. § 1254(1) 3

33 U.S.C. § 1319(a) 16

§ 1319(a)(1) 16

§ 1319(b) 16

§ 1319(c)(1) 16

§ 1319(d) 3, 10, 13, 17

§ 1319(g)(1)(A) 18

§ 1319(g)(1)(B) 18

§ 1319(g)(6)(A) 19

§ 1319(g)(6)(B) 18, 19

33 U.S.C. § 1365 ..... 2, 3, 16, 17

§ 1365(a) 10, 13, 17, 25

§ 1365(a)(1) 13

§ 1365(b) 25

§ 1365(f) 13

§ 1365(f)(6) 19

Water Quality Act of 1986, Pub. L. No. 100-4, §§ 313, 314 (1987) 18, 24

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

45 Fed. Reg. 79318 6
79328 8
79338 10
79341 9

50 Fed. Reg. 30784 ..... 5, 6, 8, 9, 10

LEGISLATIVE HISTORY

S. Rep. No. 414, 92nd Cong., 1st Sess. (1971) 18

S. Rep. No. 50, 99th Cong., 1st Sess. (1985) 18, 19, 28

H. R. Rep. No. 1004, 99th Cong., 2d Sess. (1986) 18

OTHER

United States Environmental Protection Agency, *Quality Criteria for Water*, July 1976 ..... 5, 6, 7, 8, 9, 10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Sierra Club respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-captioned proceeding on May 29, 1987.

This Court has granted a writ on the identical question presented in this petition in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation and Natural Resources De-*

fense Council, Inc., No. 86-473. This Court's decision in *Gwaltney* will in all likelihood require the modification of the opinion below. The requested writ should thus be granted to keep open the judgment in the six cases consolidated below, so that it can be conformed to the decision that this Court enters in *Gwaltney*.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 817 F.2d 1169 and is reprinted in the appendix hereto ("App.") at 1.

The opinions of the United States District Courts for the Middle and Eastern Districts of Louisiana are reprinted at App. 26.

JURISDICTION

Sierra Club brought suit against the six respondents for violation of their Clean Water Act discharge permits, pursuant to the Act's citizen suit provision, 33 U.S.C. § 1365.

Five of the six cases were brought in the Middle, and one in the Eastern, District of Louisiana. The actions against Copolymer Rubber & Chemical Co., Allied Corp., Bercen, Inc., and Formosa Plastics were consolidated by the district court and dismissed on February 7, 1985. The suit against Monochem, Inc. was dismissed on December 18, 1985. The action against Shell Oil Co. was dismissed on October 30, 1985.

Sierra Club appealed each ruling, and the cases were consolidated on appeal. The Fifth Circuit affirmed the dismissals on May 29, 1987.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides:

> Citizen Suits
>
> (a) Authorization; jurisdiction
>
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalities under section 1319(d) of this title.
>
> * * *

STATEMENT OF THE CASE

At the time Sierra Club filed suit, the respondents had among the worst records in Louisiana of noncompliance with their Clean Water Act discharge permits (NPDES permits), as the respondents reported to the Environmental Protection Agency in the discharge monitoring reports ("DMRs") that they are required to file under the Act. The permit violations reported by the respondents on their DMRs in the record are as follows.

Copolymer Rubber, in connection with operating a synthetic rubber manufacturing facility in Baton Rouge, Louisiana, holds NPDES permit LA0000914. The permit limits Copolymer Rubber's discharges into the Monte Sano Bayou. Sierra Club sued Copolymer in April 1984. Between December 1980 and September 1984, Copolymer reported violating its permit limits at least 78 times, including 5 violations in the five months after the filing of Sierra Club's suit.[1]

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[1]The following table summarizes the permit violations that Copolymer reported in its discharge monitoring reports from December 1980 through September 1984.

Parameter	*Violations*
Copper	3
Ammonia	1
Oil and Grease	14
Chemical Oxygen Demand	44
Biochemical Oxygen Demand	1
Total Suspended Solids	1
pH	14
Total	78

Copper and Ammonia are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria intended to protect waters from the effects of these substances. 50 Fed. Reg. 30784. The remaining parameters listed above all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. United States Environmental Protection Agency, *Quality Criteria for Water*, July 1976 ("*Quality Criteria*").

Allied Chemical, in connection with operating a chemical manufacturing plant in Geismar, Louisiana, holds NPDES permit LA0006181. The permit limits Allied Chemical's discharges into the Mississippi River. Sierra Club sued Allied in April 1984. Between July 1980 and August 1984, Allied reported violating its permit limits at least 119 times, including a violation in April 1984, the month the complaint was filed, and 9 more violations in the first four months after the filing of Sierra Club's suit.[2]

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[2]The following table summarizes the permit violations that Allied reported in its discharge monitoring reports from July 1980 through August 1984.

Parameter	*Violations*
Ammonia	1
Chromium	2
Zinc	1
Fluoride	24
Total Phosphorus	19
Organic Nitrogen	8
Total Suspended Solids	2
pH	62
Total	119

Ammonia, Chromium and Zinc are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79318. The remaining parameters listed above all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

Bercen, Inc., in connection with operating a specialty chemical manufacturing plant in Denham Springs, Louisiana, holds NPDES permit LA0048704. The permit limits Bercen, Inc.'s discharges into Gray's Creek. Sierra Club sued Bercen, Inc. in April 1984. Between October 1979 and May 1984, Bercen, Inc. reported 80 violations, including one violation in April 1984, the month the complaint was filed, and one additional violation in May 1984, the month after the filing of Sierra Club's suit.[3]

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[3]The following table summarizes the permit violations that Bercen, Inc. reported in its discharge monitoring reports from October 1979 through May 1984.

Parameter	*Violations*
Biochemical Oxygen Demand	41
Chemical Oxygen Demand	16
Total Suspended Solids	19
Oil and Grease	4
Total	80

All of the above parameters contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

Formosa Plastics, in connection with operating a chemical manufacturing plant in Baton Rouge, Louisiana, holds NPDES permit LA0006149. The permit limits Formosa Plastic's discharges into the Mississippi River. Sierra Club sued Formosa Plastics in April 1984. Between November 1982 and October 1984, Formosa Plastics reported 65 violations, including 27 violations in the six months after the filing of the suit.[4]

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[4]The following table summarizes the permit violations that Formosa Plastics reported in its discharge monitoring reports from November 1982 through October 1984.

Parameter	*Violations*
Chlorine	19
Chromium	4
1,2-Dichloroethane	9
Lead	5
Total Organic Carbon	18
Total Suspended Solids	4
pH	6
Total	65

Chlorine, Chromium, 1,2-Dichloroethane and Lead are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79328. The remaining substances listed all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

Monochem, in connection with operating a vinyl chloride manufacturing facility in Geismar, Louisiana, holds NPDES permit LA0006220. The permit limits Monochem's discharges into the Mississippi River and the New River. Sierra Club sued Monochem in February 1985. Between July 1980 and March 1985, Monochem reported violating its permit limits at least 136 times. Monochem reported 11 violations in February 1985, the month suit was filed, 8 violations in March 1985,[5] the month after suit was filed, and another 10 violations in April 1985.[6]

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[5]The following table summarizes the permit violations that Monochem reported in its discharge monitoring reports from July 1980 through March 1985.

Parameter	*Violations*
Mercury	18
Copper	2
Chromium	11
Zinc	4
Oil and Grease	8
Total Organic Carbon	11
Biochemical Oxygen Demand	13
Total Suspended Solids	12
Temperature	21
pH	36
Total	136

Mercury, Chromium, Copper and Zinc are of particular concern, because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79341. The remaining substances listed all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

[6]Although jurisdiction does not depend on violations that occur at the time of filing the complaint or thereafter, petitioner will update the record of violations in each case for the information of the Court should this petition be granted.

Shell Oil, in connection with operating a petroleum refinery in Norco, Louisiana, holds NPDES permit LA0003522. The permit limits Shell's discharges into the Mississippi River and Bayou Trepagnier. Sierra Club sued Shell Oil in July 1984. Between January 1980 and March 1985, Shell reported violating its permit limits at least 132 times. Shell reported 11 violations in February and March 1985, after the suit was filed.[7]

In sum, each respondent was a chronic violator of the Clean Water Act over a period of years until sued by Sierra Club. Each of them continued to violate the Act, with varying degrees of frequency, after suit was filed. The district courts had jurisdiction to determine liability and impose injunctive relief and penalties in each case, under 33 U.S.C. §§ 1365(a), 1319(d).

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[7]The following table summarizes the permit violations that Shell Oil reported in its discharge monitoring reports from January 1980 through March 1985.

Parameter	*Violations*
Chromium, hexavalent	18
Chromium, total	2
Phenols	11
Total Organic Carbon	4
Biochemical Oxygen Demand	28
Chemical Oxygen Demand	3
Total Suspended Solids	60
pH	6
Total	132

Chromium and Phenol are of particular concern because they are directly toxic to aquatic life. The EPA has established water quality criteria for the protection of waters from the effects of these substances. 50 Fed. Reg. 30784, 45 Fed. Reg. 79338. The remaining substances listed all contribute to the degradation of ambient water quality and can, of themselves, lead to fish mortality. *See Quality Criteria, supra* note 1.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly Conflicts With the Decisions of the Fourth Circuit in Gwaltney and the First Circuit in Pawtuxet Cove.

On the identical issue presented in this petition, this Court has granted a writ to review the decision of the Fourth Circuit in *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *cert. granted*, — U.S. —, 107 S.Ct. 872 (U.S. Jan. 12, 1987) (No. 86-473). The briefs in *Gwaltney* have been submitted and argument is to be scheduled by the Court.

The *Gwaltney* case, like the present cases, was a citizen suit brought to enforce a Clean Water Act discharge permit. In *Gwaltney* the defendant ceased its violations while the statutorily required notice of intent to sue was outstanding but before suit was filed. The district court held that it had jurisdiction to determine liability and impose penalties payable to the United States Treasury. The Fourth Circuit rejected defendant's claim that it could not be sued for penalties for "past" violations. The Fourth Circuit held that "citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past, are permitted under [the citizen suit provision]." 791 F.2d at 313. This Court granted a writ of certiorari to review the Fourth Circuit's decision, No. 86-473. The United States, 13 states, and several private organizations have filed briefs urging affirmance.

In *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), *petition for cert. filed* (U.S. March 17, 1987) (No. 86-1562), the plaintiff sought penal-

ties for past violations of the Clean Water Act, as well as other relief pursuant to pendant state law claims. The alleged Clean Water Act violations were actions in the past not capable of repetition. The First Circuit held that there was no jurisdiction in the case because the plaintiff did not allege that the defendant was "in violation" of the Act when the complaint was filed. Where such an allegation is made in good faith, however, the First Circuit ruled, the district court has jurisdiction to determine liability on a strict liability basis and impose penalties even when the facts later demonstrate that the violations were entirely in the past. 807 F.2d at 1094. The plaintiff in the case has petitioned this Court for a writ of certiorari.

The Fifth Circuit has taken a position diametrically opposed to that of either the Fourth or First Circuits.[8] In the opinion below, the court held that the district courts lacked jurisdiction over citizen suits where the defendants violated their permits both before and after the complaints were filed, unless the plaintiff shows that the violations were "ongoing" or "continuing",[9] by proving that the violations "were the product of . . . systematic neglect of discharge limitations or of inadequate pollution control facilities." 817 F.2d at 1174, App. at 11.[10]

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[8]As explained below, at pp. 21 to 22, the way the court below confused remedy with jurisdiction also brings its holding into conflict with *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978).

[9]The words "ongoing", "continuing" and "chronic" are used interchangeably in the opinion below, 817 F.2d at 1173-75, and in *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392, 396-98 (5th Cir. 1985).

[10]In each of the cases below, Sierra Club alleged in its complaint that the defendant had violated its permit, was con-

(Continued on following page)

This Court should grant the writ to resolve the direct conflict among the circuit courts' interpretations of the jurisdictional requirements of the Clean Water Act's citizen suit provision. In addition, the Fifth Circuit's decision conflicts with opinions of this Court. Finally, this Court should grant the writ because it has already accepted for review the identical question in *Gwaltney*, No. 86-473.

A. The Interpretation by the Court Below of the Citizen Suit Provision is Directly Contrary to those of the Fourth Circuit in Gwaltney and the First Circuit in Pawtuxet Cove.

The jurisdictional language at issue is the phrase "in violation" in the citizen suit provision of the Clean Water Act. The provision authorizes the district court to entertain an action by a citizen "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation". 33 U.S.C. § 1365(a)(1). "Effluent standard or limitation" is defined to include a permit or condition thereof. 33 U.S.C. § 1365(f). Where liability is found, the district court is authorized to impose penalties payable to the Treasury and to grant injunctive relief. 33 U.S.C. §§ 1365(a), 1319(d).

In these cases, the Fifth Circuit panel relied on a previous Fifth Circuit decision, *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392 (5th Cir. 1985). In *Hamker*, the court engrafted onto the statute a requirement that the alleged violations must be "continuing." Under the *Ham-*

(Continued from previous page)

tinuing and would continue to do so. *See, e.g.*, the complaint in *Sierra Club v. Shell Oil Company*, App. at 22. A similar allegation was used in each of the six complaints.

ker rule, a defendant is "in violation" of the statute only if its violations are "continuing." 756 F.2d at 396-97.[11] Its violations are not "continuing" if the violations cease prior to the filing of the complaint, even if the defendant has polluted illegally for years. Petitioner believes that *Hamker* was wrongly decided. It was explicitly rejected by the Fourth Circuit in *Gwaltney* and in important part by the First Circuit in *Pawtuxet Cove*. The court below, while purporting to follow *Hamker*, in fact goes well beyond it to restrict citizens' statutory right to enforce the Clean Water Act. In the present cases, the defendants' own discharge monitoring reports demonstrated violations both before and after the complaints were filed. Yet the court below broadened *Hamker* to encompass these cases by requiring not only a "continuing" violation but proof of negligence as a matter of jurisdictional fact. In so doing, the court made the conflict between the Fifth Circuit and the First and Fourth Circuits sharper than it was after *Hamker*.

The court below analyzed the minimum jurisdictional facts that a citizen plaintiff must prove as follows. The court noted that a single large industrial facility may have many discharge points from which many different pollu-

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[11]It should be noted that *Hamker*, in which the Fifth Circuit veered abruptly away from prior law on the regulation of discharges under the Clean Water Act, did not involve permit violations. *Hamker* involved a single accidental oil spill long in the past, and the relief requested was a variety of state law damage claims appended to a claim under the Act. It was this unappealing context that led the *Hamker* court to fashion a rationale for dismissing the case before it without examining the effect of that rationale on the ordinary case—the enforcement of industrial discharge permits. That rationale, expanded by the court below, directly conflicts with the Act, and would remove citizen suits as an effective tool of permit enforcement.

tants are discharged, each subject to separate limitations in a single permit. The court observed that where a permit applies different limitations to different point sources, the "violation of an effluent limitation at one point source is not a violation of any parameter at another point source even if the same pollutant is involved." 817 F.2d at 1173.

The court below continued:

> The DMR's submitted to EPA regularly by each of the appellees and relied on by Sierra Club to evidence permit violations separately identify effluent discharges at each point source for each parameter. Appellant's complaints simply aggregated the possible violations reflected by the DMR's at each appellee's facility over time, regardless whether [sic] they ininvolved the same substance or the same point source of discharge. *Although given ample opportunity to do so, Sierra Club did not attempt to demonstrate that these isolated permit violations were the product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities.*

817 F.2d at 1173-74, App. at 10-11 (emphasis added).

Moreover, wrote the court below,

> The evidence submitted by appellees demonstrated in many instances that the alleged "violations" were approved under EPA "bypass" regulations, were based on overly restrictive permit terms later liberalized by EPA, or were related to treatment methods voluntarily discontinued by the facility. What remained of Sierra Club's factual allegations were occasional, minor discharges by the facilities in the face of permit compliance rates exceeding 95% for the balance of the period in question.

Id. at 1174 (footnotes omitted). For these reasons, the court below held that the district courts lacked jurisdiction.

This conclusion is built on five serious errors of law. Several of these errors, in addition to conflicting with the Fourth and First Circuits' positions, contravene decisions of this Court.

First, the requirement of a "continuing" violation as a matter of jurisdictional fact is an error, and is in conflict with *Gwaltney* and *Pawtuxet Cove*. The statutory language authorizing citizen actions is identical to the language authorizing suits by the government with respect to the timing of a defendant's violations. The federal government is empowered to enforce Clean Water Act permits by Section 309(b) of the Act, 33 U.S.C. § 1319(b). That section states that:

> The Administrator is authorized to commence a civil action for appropriate relief . . . for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.

According to the subsection (a) referred to, the Administrator may issue a compliance order to, and thus may institute an enforcement action against, anyone who is "*in violation* of any condition or limitation . . . in a permit. . . ." 33 U.S.C. § 1319(a) (emphasis added).

Congress used identical language for authorizing citizen suits.[12] Section 505 of the Act, 33 U.S.C. § 1365, authorizing citizen enforcement suits, provides that:

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[12]The same language is used to authorize the Administrator to enforce permits issued by states with approved NPDES programs. *See* Section 309(a)(1) of the Act, 33 U.S.C. § 1319(a)(1). The only exception to the consistent use of the term "in violation" to trigger federal and citizen enforcement jurisdiction comes in the language authorizing federal criminal enforcement actions. There, still in the present tense, the Act authorizes criminal sanctions against one who "violates" the Act. *See* Section 309(c)(1), 33 U.S.C. § 1319(c)(1).

> . . . any citizen may commence a civil action . . . against any person . . . *who is alleged to be in violation of* . . . an effluent standard or limitation. . . .
>
> The district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under [Section 309(d) of the Act] section 1319(d) of this title.

33 U.S.C. § 1365 (emphasis added).

Furthermore, Congress authorized civil penalties in § 309(d) of the Act against any person who "violates" the Act, without distinguishing between civil enforcement suits brought by the attorney general or by private attorneys general. 33 U.S.C. § 1319(d); *see also* § 1365(a). The Act makes no distinction between violations that cease the day before the complaint is filed and those that continue through the filing date. Nor is there any distinction in the Act between citizen and government ability to invoke federal court jurisdiction with respect to the timing of such violations.

There is no dispute that the government can sue for penalties for past violations without proving "continuous" or "ongoing" violations. *See, e.g., Illinois v. Outboard Marine Co.*, 680 F.2d 473, 480-81 (7th Cir. 1982); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375-76 (10th Cir. 1979). The language of the Act therefore compels the conclusion that citizens can bring suit on the same basis.

By reading the same words differently for government suits and citizen suits, the Fifth Circuit differs from

the Fourth and First circuits.[13] The Fourth Circuit held that the language "in violation" does not preclude citizen suits for "past violations," 791 F.2d at 313; the First Circuit held that the good faith allegation of facts that warrant injunctive relief will support jurisdiction over exclusively "past" violations, 807 F.2d at 1094.

Congress recently endorsed the Fourth Circuit's reading of the citizen suit provision when it revisited the Act. Congress amended Section 309 of the Clean Water Act to permit the *administrative* assessment of civil penalties and expressly used the past tense: the Administrator of EPA is authorized to assess a civil penalty against "any person [who] *has violated* . . . any permit condition or limitation." § 309(g)(1)(A) and (B), as added by the Water Quality Act of 1986, § 314(g)(1)(A) and (B); 33 U.S.C. § 1319(g)(1)(A) and (B) (emphasis added). This new authority focuses on past violations because it supplements the Administrator's pre-existing authority to issue compliance orders under Section 309(a)(1) of the Act. *See* S. Rep. No. 50, 99th Cong., 1st Sess. 26 (1985); H.R. Rep. No. 1004, 99th Cong., 2d Sess. 132-133, 135-136, 138-139 (1986). Yet, the new subsection explicitly contemplates that a citizen suit may already have been filed to assess the same penalty and, in that event, allows it to proceed. § 309(g)(6)(B), as added in 1987; 33 U.S.C. § 1319(g)(6)-(B). In addition, under this new provision a prior admin-

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[13]As petitioner pointed out below, not only the language of the statute but the legislative history support the identity of structure in suits by the attorney general and by private attorneys general, once the explicit restrictions on citizen suits, *i.e.*, 60 days notice and lack of diligent prosecution, are satisfied and the citizen suit is commenced. *See* S. Rep. No. 414, 92nd Cong., 1st Sess. 64, 80 (1971).

istrative penalty action precludes a later citizen suit but only with respect to the identical past violations. § 309(g)-(6)(A) and (B), as added in 1987; 33 U.S.C. § 1319(g)-(6)(A) and (B).[14]

This new provision demonstrates that Congress believed existing law authorized citizen suits addressing past violations that no longer required injunctive remedies. Although the new provision dealing with administrative penalties employs the past tense in describing the violation, Congress saw no need to amend either Section 309(a) or (b) or Section 505(a)(1) to conform. This cannot have been mere oversight. The Water Quality Act was elaborately considered for over two years before ultimate enactment, affording ample opportunity for noticing and correcting any deficiency. The natural inference is that Congress saw the present tense of Sections 309 and 505 as no limitation on penalty actions in respect of past violations. Under these circumstances, this is a reliable guide to the original intent of the Clean Water Act. *Cf. Bob Jones University v. United States,* 461 U.S. 574, 599-602 (1983), and cases cited at 601.

In a second error, the court below essentially read the word "permit" out of the statute. Section 505 allows a citizen to sue anyone alleged to be in violation of an "effluent standard or limitation." "Effluent standard or limitation" is defined to include "a permit". 33 U.S.C.

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[14]The Senate Report, S. Rep. No. 50, *supra,* at 28 explicitly states that the preclusive effect of an administrative penalty action does not apply to a citizen suit "for a past violation of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)."

§ 1365(f)(6). Thus, to violate a permit, without more, is to violate the Act, as this Court has held. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976).

In looking for a "continuing" violation, the court below went far beyond looking for a "continuing" permit violation. The court held that only proof of the continuing violation of the same specific permit restriction at the same discharge pipe supports citizen suit jurisdiction. 817 F.2d at 1174; App. at 10-11. Yet a chemical plant, as the court below suggested, may have one permit under which it discharges, say, 100 chemicals through 30 discharge pipes. Under the Fifth Circuit's ruling, this plant could exceed its permit restrictions for each chemical at each pipe, one after another, without incurring liability for a permit violation because the violations of separate discharge limitations would not be "continuous". This is the essential holding of the court below and is absurd. To violate a permit is to violate the act. To keep violating a variety of restrictions in a permit through time is to keep violating the permit. By requiring continuous violations of the same chemical substance at the same discharge pipe for jurisdiction to attach, the court below reads permits and the requirement to comply with them out of the Act, and protects permit holders from any real chance of suit by citizens.

Third, the Court below made a serious error of law in requiring Sierra Club to demonstrate as *a matter of jurisdiction* that the violations alleged "were the product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities." As this Court

has held, to violate a permit is to violate the act, *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. at 205, and violations can be proved by reliance on a defendant's own discharge monitoring reports, *United States v. Ward,* 448 U.S. 242, 253-55 (1980), *reh'g denied,* 448 U.S. 916 (1980). Every court to consider the question has held that permits are strict liability documents, and that liability is strictly adjudged by comparing a defendant's discharge monitoring reports to its permit.[15]

As the D.C. Circuit put it in *Weyerhaeuser v. Costle,* 590 F.2d at 1058, Clean Water Act permit enforcement proceedings were designed by Congress to be simple and speedy, suitable for summary judgment. The *Weyerhaeuser* court pointed out that permits could not be enforced if enforcement proceedings "depend[ed] on murky determinations concerning the sequence of events in the plant, whether those events would have been avoidable if other equipment had been installed . . ." and so on. *Id.* The court below disagrees with *Weyerhaeuser,* and all prior precedent in other circuits. It has removed the strict liability measure of permit compliance. Instead, a citizen plaintiff must make some vaguely defined demonstration that permit violations are the "product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities." 817 F.2d at 1173-74, App. at 11. The court below would have the citizen

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[15]*See, e.g., United States v. Earth Sciences, Inc.,* 599 F.2d 368, 374 (10th Cir. 1979); *Connecticut Fund for the Environment and Natural Resources Defense Council, Inc. v. Job Plating Co.,* 623 F. Supp. 207, 218 (D.Conn. 1985); *Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Bethlehem Steel Corp.,* 608 F. Supp. 440, 451-53 (D.Md. 1985).

suit become "a form of inquest into the nature of system malfunction", *Weyerhaeuser,* 590 F.2d at 1958, *before jurisdiction attaches.* In requiring a citizen plaintiff to make a demonstration of "neglect" by the defendant in order to support jurisdiction, the court below has confused jurisdiction with remedy.

Questions of "neglect," negligence, inadequate treatment, good and bad faith, are irrelevant to a determination of jurisdiction and liability. They are relevant only to determining what penalties and injunctive relief are appropriate once liability is strictly adjudged. *See, e.g., Student Public Interest Research Group v. Monsanto Co.,* 600 F. Supp. 1479, 1486 (D.N.J. 1985); *United States v. Amoco Oil Company,* 580 F. Supp. 1042, 1050 (W.D.Mo. 1984).

In a fourth fundamental error, the court below, in discounting the defendants' violations, offered excuses for the defendants contrary to the law of this Court. The court below discounted "alleged 'violations' . . . [which] were based on overly restrictive permit terms later liberalized by EPA . . . [A]pplication of the less restrictive terms to the above cited violations [for Shell] would decrease the number of exceedences over the three year period to approximately eight." 817 F.2d at 1174 and n.5, App. at 11-12.

This Court has held that a polluter is bound by its permit, and that even a pending permit application does not excuse it from complying with the then applicable terms. As Chief Justice Rehnquist wrote in *Train v. Natural Resources Defense Council, Inc.,* 421 U.S. 60, 92 (1975) (Clean Air Act), requests for permit variances are "carried out on the polluter's time, not the public's, for

during [their] pendency, the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures." The willingness of the court below to discount violations of what it characterized as "overly restrictive" permit terms puts it in direct conflict with this Court.

In addition, the court below was willing to discount, for purposes of jurisdiction, any violations that arise from a cause that the defendant corrects *after* being sued.[16] Such a consideration may be relevant in determining remedy, but it would frustrate enforcement to permit a defendant retroactively to deprive a court of jurisdiction by coming into compliance *after being sued.* A more convenient rule for avoiding liability could not be crafted. A polluter, under this scheme, would have no incentive to comply with the law until being sued.

The court below committed a fifth serious error by fashioning what seems to be a 95% compliance test for jurisdiction. The court below wrote that after its other excuses were applied, the defendants had permit compliance rates "exceeding 95% for the balance of the period in question." 817 F.2d at 1174, App. at 12. Once again, to violate a permit is to violate the Act. The court below seems to have stated a rule that jurisdiction does not attach if the defendant makes a statistical argument that it is in compliance 95% of the time. Whatever 95% com-

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[16]The court below found it relevant to jurisdiction that Shell completed some required chrome treatment system modifications and had them operational in February 1985, seven months *after* the complaint was filed (July 1984). *See* 817 F.2d at 1174 n.6, App. at 12.

pliance may mean, and it is by no means clear,[17] it is irrelevant to jurisdiction, though it may be considered when fashioning a remedy.

In all of these matters, the court below confused remedy with jurisdiction, and by doing so read the requirement of strict liability for compliance out of the Act.[18] The court created a variety of restrictions on citizen suits which, when taken together, effectively read the citizen suit provision out of the statute.

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[17]In the case of the hypothetical chemical plant discharging pollutants from 30 different point sources, one could comply with the restrictions at 29 discharge points all of the time, commit massive violations of a cyanide limitation at the remaining point 100% of the time, and still argue one met a "95%" overall compliance test.

[18]That the court below confused questions of remedy and jurisdiction is highlighted by a section added to the Act by the Water Quality Act of 1986. The new language, added to aid the district judge in fashioning a remedy, lists the kind of considerations the court should look to in setting a penalty.

> FACTORS TO CONSIDER IN DETERMINING PENALTY AMOUNT.—Section 309(d) is amended by adding at the end thereof the following: "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.".

Water Quality Act of 1986, Pub. L. No. 100-4, § 313(c) (1987).

These factors include the kinds of considerations pointed to by the court below. The error of the court below, again, is to bring the consideration of these factors up from the *remedial* to the *jurisdictional* stage of the lawsuit.

B. The Court Below Adopted a View of the Role of the Citizen Suit Provision Contrary to the Views of the Fourth and First Circuits.

The Court below took the view that citizen suits are supplementary to government suits, and so could be effectively nullified without harming the Congressional enforcement scheme. The Fourth and First Circuits read the Act and its legislative history very differently.[19] Each of the latter concluded that citizen suits are an important mechanism in the enforcement scheme crafted by Congress. For this reason, the Fourth and First Circuits concluded, courts should not create new restrictions on citizen suits.

The Fourth Circuit, after noting the explicit restrictions on citizen suits,[20] found that Congress specified all the restrictions it meant, and that citizen suits were intended to be an important enforcement tool. Noting the identity of language authorizing government and citizen suits, the Fourth Circuit wrote that "[i]t can hardly be questioned that the EPA has authority to bring suit for civil penalties for purely past violations," and "the scope of citizen enforcement powers must, in this important respect, be viewed as co-extensive with the enforcement powers of EPA." 791 F.2d at 309-310.

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[19]Neither the *Hamker* court nor the court below, unlike the Fourth and First Circuits, examined any legislative history of the Clean Water Act.

[20]The statute requires 60 days notice prior to suit, and precludes citizen action if the state or federal government has filed a prior action and is diligently prosecuting it. 33 U.S.C. § 1365 (a) and (b).

The First Circuit likewise found that citizen suits are authorized for past violations, as long as there is an allegation which, if true, would warrant an injunction.[21] The court wrote:

> We do not . . . agree with the reasoning which, apparently, led the Louisiana district court, following the *Hamker* decision, to dismiss a number of actions simply because no violations occurred on the dates the complaints were filed. *See Sierra Club v. Copolymer Rubber & Chemical Corp.*, 621 F.Supp. 1013, 1015 (M.D.La. 1985) [one of the cases in this petition]. A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.

807 F.2d at 1094.

The court below, to the contrary, read citizen suits out of the statute, and justified doing so by noting irrelevantly that the state and federal governments have enforcement powers. The court below found that citizen suits are supplementary to government suits and drew the unfounded conclusion that they are supererogatory: "We think it unlikely that Congress's explicit restrictions on the right to bring private enforcement actions significantly impair the efficacy of the general regulatory framework," because "[b]oth the federal and state governments can abundantly enforce the Clean Water Act by means of

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[21]Petitioner believes that the Fourth Circuit read the Act correctly and that insofar as the First Circuit required any allegation of continuing violation it was in error. Petitioner has argued this position in an *amicus curiae* brief in *Gwaltney*, No. 86-473.

criminal and civil actions authorizing monetary or injunctive awards." 817 F.2d at 1175, App. at 15.

The court below is correct that the governments *could* enforce the law. The citizen suit mechanism, of course, was designed precisely to fill the gap when governmental agencies cannot or will not exercise their enforcement authority. The court below is also correct to say that the restrictions that *Congress,* as opposed to the court below, placed on citizen suits do not impair the enforcement scheme. The adventitious restrictions created by the court below, however, tend to remove citizen suits from the enforcement scheme.

The view of the court below, that the "efficacy of the general statutory framework" is not impaired by disabling citizen suits, is a view directly contrary to that of the Fourth and First Circuits.

C. The Decision Below Cannot Be Reconciled With the Decisions of the Fourth and First Circuits.

The Fifth Circuit's prior ruling on citizen suits under the Act, *Hamker,* was the case relied on by the petitioners in *Gwaltney* to support their argument that there was a split in the circuits on the question of whether a citizen suit under the Act could be maintained for a "past" violation. This Court granted their petition for writ of certiorari, No. 86-473.

The opinion below creates an even sharper conflict. The court below, stating that it was bound by *Hamker,* extended that ruling broadly. While in the Fourth Circuit, under *Gwaltney,* a citizen action may be maintained based on DMRs for violations that ceased prior to the

filing of the complaint, and while in the First Circuit, under *Pawtuxet Cove*, a citizen suit may be maintained on the same facts if the plaintiff alleges ongoing violations in good faith, the court below requires much more. Saying that a "continuing" violation is required, the court below then requires proof of neglect or negligence as a matter of jurisdiction. The view of the court below is diametrically opposed to those of the Fourth and First Circuits and cannot be reconciled with them.

II. The Question Over Which the Fifth Circuit Has Split With the Fourth and First Circuits is Important and Recurring.

Congress, in reauthorizing the Clean Water Act this year, inquired into the way citizen suits were working. It noted that "[i]n the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act," S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985), and declared itself well satisfied with the result, *id.*

Citizens in the Fifth Circuit are now effectively disabled from exercising their statutory right to enforce the Act, and are permitted to exercise it elsewhere in the country. Until the errors of the court below are corrected, polluters in the Fifth Circuit will enjoy a protection that Congress did not allow them, and that they do not have elsewhere. Moreover, the decision of the court below, until corrected, will tend to chill the effectiveness of citizen suits in other areas of the country as well.

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CONCLUSION

For the reasons set out above, this Court should grant the writ requested.

Respectfully submitted,

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SIERRA CLUB v. SHELL OIL CO.

SIERRA CLUB, Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

Appeal from the United States District
Court for the Eastern District
of Louisiana

SIERRA CLUB, Plaintiff-Appellant,

v.

MONOCHEM, INC., Defendant-Appellee.

SIERRA CLUB, Plaintiff-Appellant.

v.

COPOLYMER RUBBER AND
CHEMICAL CORP., et al.,
Defendant-Appellee.

Nos. 85-3753, 85-3762, 85-3763.

United States Court of Appeals,
Fifth Circuit.

May 29, 1987.

Environmental organization brought actions under Clean Water Act based on multiple, sporadic, and past violations of various effluent limitations. The United States District Court for the Eastern District of Louisiana, Patrick E. Carr, J., and the United States District Court for the Middle District of Louisiana, Frank J. Polozola, J., either dismissed cases or awarded summary judgment to

defendant. Appeals were taken. The Court of Appeals, Edith H. Jones, Circuit Judge, held that multiple, sporadic, and past violations of various effluent limitations could not form basis of citizens' lawsuits.

Affirmed.

1. Federal Courts 29

Where defendant's challenge to court's jurisdiction is also a challenge to existence of federal cause of action, proper course is to find that jurisdiction exists and deal with objection as direct attack on merits of case, and judicial economy further counsels resolution on merits so that court can avoid duplicative trials of facts essential to both jurisdiction and merits.

2. Federal Civil Procedure 2481

When plaintiff bringing citizens' lawsuit under Clean Water Act has alleged ongoing violation, but fails to demonstrate fact issue about whether defendant is "in violation," trial court should grant summary judgment for defendant on merits, instead of dismissing for want of jurisdiction. Federal Water Pollution Control Act Amendments of 1972, § 505(a), as amended, 33 U.S.C.A. § 1365(a); Fed.Rules Civ. Proc.Rules 12(b)(1), 56, 28 U.S.C.A.

3. Federal Civil Procedure 1781

Although fact-based dismissals of Clean Water Act actions were contrary to the Fifth Circuit's practice of ruling on the merits, dismissals did not fatally affect disposition of cases where orders dismissing for lack of jurisdiction were entered following extensive discovery. Federal Water Pollution Control Act Amendments of 1972,

§§ 101 et seq., 505, as amended, 33 U.S.C.A. §§ 1251 et seq., 1365; Fed.Rules Civ. Proc.Rule 12(b)(1), 28 U.S.C.A.

4. Health and Environment 25.15(4)

Multiple, sporadic, and past violations of various effluent limitations contained in national pollutant discharge elimination system permits could not form the basis of citizens' lawsuits under Clean Water Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 505, as amended, 33 U.S.C.A. §§ 1251 et seq., 1365.

Appeals from the United States District Court for the Middle District of Louisiana.

Before VAN GRAAFEILAND*, HIGGINBOTHAM, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

We are here called upon to assess whether multiple, sporadic, past violations of various effluent limitations contained in National Pollutant Discharge Elimination System ("NPDES") permits held by the defendants may form the basis of a citizens' lawsuit under section 505 of the Clean Water Act.[1] 33 U.S.C. § 1365. Bound by our prior decision in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir.1985) and by appellant's failure to raise a genuine question of material fact on the critical

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* Circuit Judge of the Second Circuit, sitting by designation.

1. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.* are commonly known as the Clean Water Act.

issue, we AFFIRM the decisions of the district courts which dismissed these cases.[2]

The underlying lawsuits were filed following a systematic research program in which the Sierra Club examined discharge monitoring reports ("DMR's") filed by every major industrial discharger in Louisiana. The DMR's, which are prepared and filed by the defendant companies with the Environmental Protection Agency ("EPA"), may furnish some evidence concerning whether the discharger is in compliance with the terms of its NPDES permit for the period of time covered in each DMR. Having concluded by this research that the instant defendants were violating the terms of their NPDES permits, Sierra Club delivered the statutory 60-day notices and then filed separate lawsuits against each defendant. Each action averred that the defendant had violated various terms of its NPDES permit between January 1980 and June, 1983, and all complaints alleged that the defendant "is now violating its permit, and will do so in the future." The complaints requested that civil penalties of up to $10,000 per day of violation for each violation be imposed, that an injunction be issued against further violations, and that Sierra Club recover costs including attorneys, wit-

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2. Five of the citizens' enforcement suits were brought by the Sierra Club in the Middle District of Louisiana. The actions against Copolymer Rubber & Chemical Co., Allied Corp., Bercen, Inc., and Formosa Plastics Corp., were consolidated by the district court and dismissed on February 7, 1985. Subsequently, Sierra Club filed against Monochem also in the Middle District. This case was dismissed by the district court on December 18, 1985. The sixth of these consolidated appeals was filed against Shell Oil Co. in the Eastern District of Louisiana on July 24, 1984 and was dismissed on October 30, 1985.

ness and consultant fees, as provided for in 33 U.S.C. § 1365(d).

During the pendency of the lawsuits, this Court issued its opinion in *Hamker* and held that district courts are without jurisdiction to hear citizens' suits alleging a single past pollutant discharge in violation of the Clean Water Act. Ongoing discovery in these cases became focused on the application of *Hamker*. Because *Hamker* resulted in a dismissal of the plaintiff's complaint for want of jurisdiction, appellees each contested the court's subject matter jurisdiction, resting on affidavits and considerable documentary evidence concerning the status of the various alleged permit violations. In some of the cases, appellant responded that DMR's filed for the period after June, 1983 showed that further permit violations had occurred subsequent to the filing of its lawsuits. The district courts treated these motions differently. In the four cases consolidated under the *Copolymer* style, *see* note 2 *supra*, the court dismissed pursuant to Fed. R.Civ.P. 12(b)(1) for want of jurisdiction, without prejudice to any state law claim that might be asserted. 621 F.Supp. 1013. The *Monochem* court simply dismissed under Rule 12(b)(1), while the *Shell* court awarded a Rule 56 summary judgment to the defendant. These appeals followed.

I.

The Clean Water Act intertwines the jurisdiction of the district court with the grounds for relief in a citizen enforcement action. Under the general caption, "Citizen Suits: jurisdiction," it authorizes

> any citizen [to] commence a civil action on his own behalf—(1) against any person . . . who is alleged to

> be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. . . .

3 U.S.C. § 1365(a). Consequently, where the requirement that the discharger be "in violation" is interpreted to mean that a violation must be ongoing at the date the suit is filed, the plaintiff must allege an ongoing violation to invoke the court's jurisdiction.

The Court affirmed a dismissal in *Hamker* for lack of jurisdiction because the pleadings there alleged a single oil spill prior to the date of suit and patently excluded the possibility of the defendant's being "in violation" thereafter. *Hamker's* emphasis on jurisdiction was appropriate to that case because a court may determine it lacks jurisdiction based on pleadings alone. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1350 (1969). Two of the district courts here, apparently intending to follow *Hamker,* dismissed under Rule 12(b)(1) for lack of jurisdiction based on undisputed facts revealed in discovery rather than on the pleadings. Such fact-based dismissals are contrary to this circuit's practice of ruling on the merits, but they do not fatally affect the disposition of these cases.

[1] This Court has held that when, as here, issues of jurisdictional fact are intermeshed with the merits of a case, "the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other." *McBeath v. Inter-American Citizens for Decency Commit-*

tee, 374 F.2d 359, 363 (5th Cir.1967).[3] The purpose of this rule is to discourage district courts from dismissing cases on the pleadings for want of jurisdiction unless the pleadings reveal a clearly insubstantial or frivolous claim. *Compare Bell v. Hood,* 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946). Thus, "[w]here the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir. 1981). Judicial economy further counsels resolution on the merits in these instances so that the court can avoid duplicate trials of facts essential to both jurisdiction and the merits of the claim. *Id.* at 415-16.

[2] As a result, when a plaintiff has alleged an ongoing violation for purposes of § 1365(a), but he fails to demonstrate a fact issue about whether a defendant is "in violation," the court should grant summary judgment for the defendant on the merits under Fed.R.Civ.P. 56, instead of dismissing for want of jurisdiction under Fed.R. Civ.P. 12(b)(1).

[3] Although the letter of *McBeath* and *Williamson* were violated in all but one of these cases, their spirit was not. None of the cases was cavalierly treated. The orders dismissing for lack of jurisdiction were entered fol-

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3. This is not to say that for cases in which the jurisdiction and merits are separable issues, such as whether $10,000 is actually in controversy in a diversity case, the district court may not dismiss pursuant to a fact finding rendered under Fed.R.Civ.P. 12(b)(1). *See* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1350 at 556 (1969).

lowing extensive discovery in each case. The district courts strained to afford Sierra Club an opportunity to demonstrate a fact issue on whether appellees were "in violation" of their permits when these suits were filed. The courts' ultimate determinations rest on a complete and undisputed factual record. Sierra Club does not contend that further discovery is necessary to support its position. Consequently, dismissing some of the cases for lack of jurisdiction was tantamount to summary judgment against Sierra Club on the merits of the critical issue of appellees' being "in violation" when the actions were filed. No reversible error follows from this procedural flaw.

II.

[4] The district courts found that under *Hamker,* the appellees in this case were not "in violation" of the NPDES permits when Sierra Club filed suit. In *Hamker,* the panel reasoned that section 1365 does not permit a citizen lawsuit to enforce the Clean Water Act where there is no ongoing violation of an effluent standard, limitation or order. Thus, the plaintiff there could not state a cause of action for a single past oil discharge. Judge Williams, specially concurring, suggested however that the statutory language "in violation" is broad enough to cover the "chronic episodic violator" who "intentionally turns off the spigot" just before a citizen brings suit. 756 F.2d at 399 (Williams, J., concurring). We need not enter a debate concerning the extent of the *Hamker* holding because the uncontradicted evidence in these cases demonstrated only past, sporadic or largely unconnected permit violations by each of the appellees. Not only was [sic] none of the violations ongoing at the date Sierra Club filed suit in

either a "chronic episodic" or actual sense, but Sierra Club never attempted to establish, and in fact eschewed the possibility that there might be any requirement of demonstrating the ongoing or chronic nature of such violations. Sierra Club's proof failed to comport with its pleadings.

To demonstrate the failure of Sierra Club's proof, it is necessary to explain how the Clean Water Act affects industrial dischargers. The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. 33 U.S.C. § 1251 (a). This objective was to be achieved by the application of increasingly more stringent "effluent limitations" designed to reduce gradually the amount of pollutants discharged into waterways. These effluent limitations are to be technologically based, meaning that dischargers must reduce the amount of pollutants by using specific technologies or their equivalents. "Effluent limitations" promulgated by the EPA are the actual restrictions on discharges which limit quantities, rates and concentrations of substances that may be discharged from point sources. 33 U.S.C. § 1362(11). Effluent limitations are usually expressed numerically (e.g., the number of pounds per day or the concentration of a pollutant discharged). Effluent limitations are to be applied to all point sources of discharge at a facility. A "point source" means the point of discharge of the pollutant-containing effluent. 33 U.S.C. § 1362(14). Effluent limitations, which were developed for entire industrial categories or subcategories, are transformed into limitations on individual plants within the category or subcategory by incorporation into the terms and conditions of NPDES discharge permits. 33 U.S.C.

§1342. If a discharger is in compliance with the effluent limitations contained in its NPDES permit, it is deemed to be in compliance with the Clean Water Act. 33 U.S.C. § 1342(k).

One industrial facility may have numerous point sources of discharge. These point sources may serve a single process unit, multiple units, single or multiple treatment facilities, or may only carry storm water runoff. To borrow appellees' example, a single site may contain an herbicide manufacturing plant, a chlorinated solvent manufacturing plant, and a plastics manufacturing plant, all of which are completely unrelated and belong to different industrial subcategories having different effluent limitations. Each plant might in turn maintain its own waste water treatment system and have several point sources for the effluents from its facilities. Due to the unique process and treatment arrangements at each plant, when incorporating effluent limitations into NPDES permits, EPA developed separate conditions for each pollutant at each separate point source. This is necessary to make effluent limitations technology-based. Also, because the treatment system for each point source may be unrelated to the treatment system for any other point source, a violation of an effluent limitation (a "parameter") at one point source is not a violation of any parameter at another point source even if the same pollutant is involved. Consequently, when determining whether a permit-holder has violated an effluent limitation, one must look at each parameter within each point source independently.

The DMR's submitted to EPA regularly by each of the appellees and relied on by Sierra Club to evidence

permit violations separately identify effluent discharges at each point source for each parameter. Appellant's complaints simply aggregated the possible violation reflected by the DMR's at each appellee's facility over time, regardless whether they involved the same substance or the same point source of discharge. Although given ample opportunity to do so, Sierra Club did not attempt to demonstrate that these isolated permit violations were the product of appellees' systematic neglect of discharge limitations or of inadequate pollution control facilities. We have thoroughly reviewed the record in each of these cases. The evidence submitted by appellees demonstrated in many instances that the alleged "violations" were approved under EPA "bypass" regulations,[4] were based on overly restrictive permit terms later liberalized by EPA[5], or were

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4. In its notice to Allied and as part of its complaint filed in district court, Sierra Club claimed 21 effluent limitations "exceedences" on point source 003 from January, 1983 to May, 1983 at Allied's Geismar, Louisiana chemical complex. It is apparently undisputed, however, that these "exceedences" were a direct result of "bypass" discharges approved by the EPA. Under 40 C.F.R. § 122.60 (1982) (superseded) Allied sought and obtained EPA approval of anticipated "bypass" resulting in diversion of water from its "treatment facility" and discharge into the Mississippi River. According to the terms of the administrative order allowing "bypass", the EPA found that Allied "anticipates the need to discharge process wastewater from the Clearwell of the water recirculation system because the Company claims that precipitation events and lack of production will cause the process wastewater level to rise into surge capacity of the Clearwell." Thus, on January 21, 1983 the EPA approved the requested discharge of wastewater until May 31, 1983.

5. For example, Sierra Club's assertions of "chronic episodic" violations is demonstrated most readily from its claim that Shell exceeded its daily maximum effluent limitations of

(Continued on following page)

related to treatment methods voluntarily discontinued by the facility.[6] What remained of Sierra Club's factual allegations were occasional, minor discharges by the facilities in the face of permit compliance rates exceeding 95% for the balance of the period in question.

(Continued from previous page)

Total Suspended Solids ("TSS") on outfall 002 at its Norco, Louisiana petroleum refinery approximately 46 times between April 1980 and June 1983. Recognizing the technical difficulties in complying with its then current NPDES permit requirements, the EPA liberalized Shell's TSS effluent limitations for outfall 002 in August 1983. While the new permit had no retroactive effect, application of the less restrictive terms to the above cited violations would decrease the number of exceedences over the three year period to approximately eight.

The NPDES permit limitations were similarly liberalized for Formosa Plastics Corp.'s Geismar, Louisiana chemical manufacturing plant. The EPA increased effluent limitations for total organic carbon ("TOC") because the plant's previous TOC limitations were found to be unnecessarily restrictive.

Finally, the EPA itself promulgated rules in 1982 reducing the generally required "pH" excursion compliance rate from 100% to only 99% compliance. See 40 C.F.R. § 401.17 (1986). The EPA determined that adjusting the standard "will establish a standard that well-operated and well-maintained plants could realistically achieve and will reserve the resources of both EPA and permittees for those instances when substantial pH control problems exist." 47 Fed.Reg. 24,534, 24,535 (1982). It is apparently undisputed that of Allied Chemical's 62 alleged pH "excursions"—incidents whereby the pH value of discharge wastewater exceeds applicable effluent ranges—the majority would not have violated current EPA guidelines, bringing compliance within the 99% requirement.

6. In an effort to ensure compliance with EPA hexavalent and total chromium effluent limitations, Shell's Norco refinery implemented a conversion to a non-chromate corrosion control system. As of February, 1985 this conversion has evidently been completed. The record reveals that Shell's last violation of permit limitations for chromium occurred on March 7, 1984.

III.

Sierra Club first argues that *Hamker* is distinguishable because it did not involve an NPDES permit. The statute belies any such distinction, for the citizen suit provision uses the term "effluent standard or limitation under this chapter" to include both permit and non-permit based violations of effluent standards found in the Clean Water Act. *See* 33 U.S.C. § 1365(f). This argument poses the classic distinction without a difference. Sierra Club has never explained why, beyond the fact that it is more likely to be a plaintiff, different standards for a facility's being "in violation" should obtain depending on whether an NPDES permit is in force. Appellant's unarticulated assumption may be that the mere aggregation of past permit violations or "exceedences" distinguishes these cases from *Hamker*. We disagree. *Hamker* explicitly rejected the applicability of the citizen suit provision to isolated past pollution discharges. *Hamker* was grounded firmly in the language of the statute, which uses the present tense formulation "in violation" to authorize citizen enforcement actions. Whether a defendant has engaged in one or ten discrete instances of impermissible effluent discharge cannot convert those actions from past to present conduct for purposes of the statute. The Fourth Circuit, which rejected *Hamker's* construction of the citizen suit provision, hesitated to do so on the distinction between a NPDES permit violation case and a non-permit case. *Chesapeake Bay Foundation v. Gwaltney of Smithville, Ltd.*, 791 F.2d 304, 312 (4th Cir.1986), *cert. granted*, — U.S. —, 107 S.Ct. 872, 93 L.Ed.2d 827 (1987).

The balance of Sierra Club's briefs is devoted to demonstrating that *Hamker* is incorrect and represents an

unworkable approach to enforcement of the Clean Water Act.[7] Even if *Hamker* were erroneously decided, our panel could not overrule a prior controlling decision in this Circuit. Only the en banc court has that authority. We are unpersuaded, however, that *Hamker* was wrongly decided. The First Circuit recently cited *Hamker* with approval in a factually similar single-discharge case. *Pawtuxet Cove Marina Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir.1987). The court concluded that "the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Id.* at 1093. In so doing, the First Circuit rejected the Fourth Circuit's construction of section 1365(a) rendered in *Chesapeake Bay Foundation v. Gwaltney*. There the court found the language "to be in violation" ambiguous and concluded that a citizen suit could be predicated upon past violations of the terms of an NPDES permit. 791 F.2d at 309. *Gwaltney* is the only circuit court that differs with the construction of section 1365(a) approved by *Hamker*.

We further disagree with Sierra Club's assertion that the Clean Water Act's enforcement provisions are rendered "unworkable" by construing "in violation" in its grammatically natural sense to require some kind of on-

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7. Sierra Club is seriously hampered in arguing *Hamker's* distinction from the present cases because Sierra Club's amicus brief in *Hamker*, asserting the arguments made here, was obviously rejected by our prior panel.

going effluent violation by the discharger.[8] The court in *Hamker* carefully explained the distinction between citizen suits and enforcement actions brought by governmental authorities. Both the federal and state governments can abundantly enforce the Clean Water Act by means of criminal and civil actions authorizing monetary or injunctive awards. 33 U.S.C. § 1319. Governmental actions were envisaged to be the central enforcement arm under the Act. *Hamker*, 756 F.2d at 395. The private enforcement action, on the other hand, is supplementary to the scheme of the statute overall. As noted in *Hamker*, the required 60 days' prior notice of a plaintiff's intent to file suit under the citizen provisions may encourage a defendant who is violating effluent limitations to "clean up his act" before suit is filed. *Id.* at 396. Moreover, where a government action is being diligently prosecuted, the citizen is barred from bringing suit. 33 U.S.C. § 1365 (b)(1)(B). We think it unlikely that Congress's explicit restrictions on the right to bring private enforcement actions significantly impair the efficacy of the general regulatory framework.

In affirming the judgments of the district courts on the foregoing grounds, we are not required to decide other issues presented by this appeal. Specifically, we need not determine whether Sierra Club has standing to prosecute the instant actions, whether private lawsuits may be filed

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8. The First Circuit noted how easy it would have been for Congress to authorize citizens suits against any party alleged "to have violated" the Clean Water Act. *Pawtuxet Cove*, 807 F.2d at 1092.

only for violations of NPDES permits currently in force,[9] or whether the citizen suit section of the statute unconstitutionally confers powers of the executive branch of government upon citizens.

Sierra Club finally argues that the district court abused its discretion in awarding costs of suit be [sic] in favor of Shell Oil Company, one of the appellees herein. Pursuant to 33 U.S.C. § 1365(d), the court is permitted to award costs of litigation, including attorney and expert witness fees, to any party whenever the court determines such award is appropriate. Sierra Club suggests no basis for finding an abuse of discretion, and we perceive none.

The judgments of the district courts are AFFIRMED.

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9. Construing § 1365(f), which allows private enforcement actions to enforce a "permit or condition thereof . . . which is in effect under this chapter", the court in *Pawtuxet Cove* held that no private enforcement action could be brought for violations of a permit under which the defendant had ceased operating. 807 F.2d at 1094.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
AT NEW ORLEANS

SIERRA CLUB 530 Bush Street San Francisco, California 94108 Plaintiffs, v. SHELL OIL COMPANY One Shell Plaza Post Office Box 10 Norco, Louisiana 70079 Defendant.	Civil Action No. 84-3583 SECT. J MAG. 2 COMPLAINT

INTRODUCTION

1. This action is a citizens' suit brought under Section 505 of the Clean Water Act ("the Act"), 33 U.S.C. § 1365. Plaintiff seeks declaratory and injunctive relief, the imposition of civil penalties, and the award of costs, including attorneys' and expert witness' fees, for Defendant's repeated violations of the terms and provisions of its National Pollutant Discharge Elimination System ("NPDES") permit number LA0003522 in violation of § 301(a) of the Act, 33 U.S.C. § 1311(a).

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the claims set forth in this Complaint under Section 505(a)(1) of the Act, 33 U.S.C. § 1365(a)(1).

3. On January 20, 1984, Plaintiff gave notice of the violations and of its intent to file this suit to the Administrator of the United States Environmental Protection Agency ("EPA"), to the Louisiana Department of Natural Resources ("DNR"), Water Pollution Control Division, and to the Defendant, as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A). A copy of the notice is attached as Appendix A and is incorporated herein.

4. More than sixty days have passed since notice was served and neither EPA nor DNR has commenced and diligently prosecuted a civil or criminal action in a court of the United States or in a court of the State of Louisiana to redress these violations.

5. Venue is appropriate in the Eastern District of Louisiana pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), since the source of the violations is located within this District.

PARTIES

Plaintiffs

6. Plaintiff Sierra Club is a non-profit corporation organized under the laws of the State of California with its principal place of business at 530 Bush Street, San Francisco, California 94108, and with other offices located throughout the country. The Sierra Club is a national conservation organization having over 200,000 members, approximately 2,000 of whom reside in Louisiana and are members of its Delta Chapter. The Sierra Club was organized to study, protect, enhance, and enjoy natural and scenic resources, including the nation's navigable waters.

Through participation in numerous legislative, administrative and judicial proceedings, the Sierra Club has demonstrated its strong interest in the effective conservation and enhancement of the nation's waters and in the proper enforcement of laws designed to protect those waters.

7. Members of the Sierra Club, Delta Chapter, reside in, or own property in, or recreate in the vicinity of Bayou Trepagnier, part of Louisiana's Scenic Rivers System. There is a New Orleans Group of the Delta Chapter. These members use and enjoy the resources in, around and downstream of Bayou Trepagnier and in and around Lake Pontchartrain into which the Bayou Trepagnier flows for boating, hunting, fishing, camping, wildlife viewing, photography, and general aesthetic and spiritual enjoyment. The quality of the waters of the State of Louisiana including the waters impacted by Defendant's illegal discharge directly affects these interests of Sierra Club members. Plaintiff and its members have been, are being, and will be adversely affected and irreparably harmed by Defendant's failure to comply with its NPDES permit requirements.

Defendant

8. Defendant Shell Oil Company is organized under the laws of the State of Delaware. Defendant operates a petroleum refinery in Norco, Louisiana.

BACKGROUND

9. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States if such discharges are not authorized by or are in violation of the

terms of an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342.

10. EPA is responsible for issuance of NPDES permits pursuant to 33 U.S.C. § 1342 to dischargers in Louisiana since the Administrator has not approved a state permitting program for Louisiana pursuant to 33 U.S.C. § 1342(b).

11. EPA, pursuant to Section 402 of the Act, 33 U.S.C. § 1342, issued to Defendant NPDES permit number LA0003522 effective on July 23, 1977, authorizing the Defendant to discharge specified amounts of pollutants from its Norco facility into the Mississippi River and Bayou Trepagnier, which are navigable waters of the United States.

12. Section 308 of the Act, 33 U.S.C. § 1318, requires each NPDES permitee to establish and maintain records; to install, use, and maintain monitoring equipment; to sample effluent and report on a regular basis to the permit issuing Agency regarding the facility's discharge of pollutants. The reports consist of Discharge Monitoring Reports ("DMRs") and Non-Compliance Reports ("NCRs"). In these reports the permittee must state on a periodic basis whether it is in compliance with the terms of its permit.

13. Representatives of Plaintiff and other citizens' environmental organizations have examined and evaluated EPA NPDES discharge permit compliance files on a comprehensive basis for several states including Louisiana. In this research these organizations looked for those companies where they appeared to be persistent and historic patterns or permit non-compliance and where there had

been no diligent prosecution by Federal or State authorities. Defendant is such a company. Thereafter "60 day notices," such as the one described in paragraph 3 above, were sent to the Defendant and other companies as required by the Act, with copies to EPA and the State. These notices serve as final notices to the Federal and State agencies to enforce the law, while giving the company an opportunity to correct any misunderstandings as to violations of the law or to reach dispositions short of litigation, which satisfy the purposes of the Act.

14. The specific violations of permit limits identified in Appendices A and B to this Complaint were taken directly from the noncompliance and discharge monitoring reports (NCRs and DMRs) submitted to EPA by the Defendant pursuant to the reporting requirements established by Federal law and reflected in Defendant's NPDES permit.*

GENERAL ALLEGATIONS

15. Defendant operates a petroleum refinery in Norco, Louisiana. It discharges treated wastes through four point sources into the Mississippi River and Bayou Trepagnier pursuant to NPDES permit number LA0003522.

16. Defendant has submitted DMRs and NCRs to EPA covering at least the periods shown in Appendices A and B, which publicly disclose a pattern of substantial non-compliance with the Clean Water Act.

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* Plaintiffs made four typographical errors in transferring this information to the Notice Letters. Those errors and their corrections are listed in Appendix C hereto.

17. Defendant's record of noncompliance with NPDES permit number LA0003522 appears in detail in Appendices A and B.

18. Defendant's violations have been numerous and repeated. In general, between March 1980 and March 1984, Defendant has violated its permit limitations for Total Suspended Solids (TSS), Biological Oxygen Demand (BOD), Chemical Oxygen Demand (COD), Hexavalent Chromium, Total Chromium, Phenols, Total Organic Carbon and pH at least 120 times.

19. On information and belief, Plaintiff further alleges that Defendant has violated the permit limitations subsequent to the violations listed in Appendices A and B and continues to be in violation of the Act.

20 Plaintiff alleges that there has been no diligent prosecution of Defendant through civil or criminal court action by the EPA or the DNR concerning the specific charged violations.

21. Because of the extensive history of violations of the effluent standards imposed by NPDES permit number LA0003522, Plaintiff believes and alleges that without imposition of appropriate civil penalties and the issuance of an injunction, Shell Oil Company will continue to violate its NPDES permit creating further injury to the environment and others.

CLAIMS

22. Plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 21 and Appendices A and B to this Complaint.

23. Defendant's wastewater discharges identified in Appendices A and B are discharges from point sources into navigable waters of the United States within the meaning of Section 301 of the Act, 33 U.S.C. § 1311.

24. Defendant's wastewater discharges from Outfalls 002 and 004 as listed in Appendices A and B to the Complaint, and those which have been committed subsequent to those listed in Appendices A and B, are violations of its permit limitations for the pollutants listed in paragraph 18 above, and constitute violations of Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342.

RELIEF

Wherefore, Plaintiff respectfully requests this Court to grant the following relief:

A. Declare Defendant Shell Oil Company to have violated and to be in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342;

B. Enjoin the Defendant from operating its facility in Norco, Louisiana in such a manner as will result in the further violation of the defendant's NPDES permit number LA0003522;

C. Authorize Plaintiff for the period beginning on the date of the Court's order and running for one year after Defendant achieve compliance with all of the limitations in its NPDES permit, to sample or to arrange sampling of any discharge of pollutants from Defendant's facility with the cost of the sampling to be borne by Defendant;

D. Order Defendant to provide Plaintiff, for the period beginning on the date of the Court's order and running for one year after Defendant achieves compliance with all of the limitations of its NPDES permit, with a copy of all reports and other documents which Defendant submits to the Federal or State government regarding Defendant's NPDES permit, to be submitted at the time it is submitted to these authorities;

E. Order Defendant to pay civil penalties of $10,000 per day of violation for each violation pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d) and 1365(a), including those listed in Appendices A and B and violations committed subsequent to those listed in Appendices A and B;

F. Award Plaintiff its costs, including reasonable attorneys' and expert witness' fees, as authorized by Section 505(d) of the Act, 33 U.S.C. 1365(d); and

G. Award such other and further relief as this Court deems appropriate.

Dated: .....

.....

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Local Counsel for Plaintiff

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

SIERRA CLUB
VERSUS
COPOLYMER RUBBER AND
CHEMICAL CORPORATION

CIVIL ACTION
NUMBER 84-407-B

SIERRA CLUB
VERSUS
ALLIED CHEMICAL CORPORATION

CIVIL ACTION
NUMBER 84-408-B

SIERRA CLUB
VERSUS
BERCEN SOUTHERN DIVISION OF
BERCEN INCORPORATED

CIVIL ACTION
NUMBER 84-409-B

SIERRA CLUB
VERSUS
FORMOSA PLASTICS CORPORATION

CIVIL ACTION
NUMBER 84-410-B

* * * * *

FRANK J. POLOZOLA, District Judge:

These consolidated cases[1] were filed by Sierra Club under the citizen suit provision of the Clean Water Act, 33 U.S.C. 1365(a). In each of these cases, Sierra Club contends the defendants have violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

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[1]The Sierra Club filed separate suits against Copolymer Rubber and Chemical Corporation ("Copolymer") (CA 84-407-B), Allied Chemical Corporation ("Allied") (CA 84-408-B), Bercen Southern Division of Bercen Incorporated ("Bercen") (CA 84-409-B), and Formosa Plastics Corporation ("Formosa") (CA 84-410-B). Because the same jurisdictional issue is involved in each cases, the Court has consolidated the cases in the interest of judicial economy.

I Procedural History of the Cases

After these suits were filed, the standing of the Sierra Club to bring these suits became an issue in this case. In order to determine the legal standard to be applied by the Court on the standing issue, the Court stayed discovery on all issues except standing and ordered the parties to file briefs on the issue. After the Court denied plaintiff's motion for partial summary judgment on the standing issue, the Fifth Circuit Court of Appeals rendered its decision in *Hamker v. Diamond Shamrock Chemical Company*, 756 F.2d 392 (5th Cir. 1985). Thereafter, the Court ordered the parties to file briefs on whether the Court had jurisdiction in these cases under the *Hamker* decision. In addition, Copolymer filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure.[2] Briefs were filed, oral argument was held on two occasions and the matter was submitted to the Court.

II The Court's Jurisdiction

It is well settled that a federal court is empowered to hear only such cases as are within the judicial power of the United States, as defined in the Constitution, and have been entrusted to them by a jurisdictional grant by Congress.[3] It is also equally settled that a federal court has an obligation to notice want of subject matter jurisdiction

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[2]After oral argument was held on the *Hamker* jurisdiction issue and the matter was submitted to the Court, Sierra Club filed another motion for partial summary judgment on the issues of standing and liability.

[3]13 Wright, Miller & Cooper, *Federal Practice and Procedure Jurisdiction* § 3522.

on its own motion.[4] Where the subject matter jurisdiction of the Court has been challenged, the burden is on the party claiming jurisdiction to demonstrate that jurisdiction of subject matter exists.[5] Thus, the burden is upon the Sierra Club to demonstrate that subject matter jurisdiction exist in these cases.

III The Hamaker Decision

Hamaker v. Diamond Shamrock Chemical Company, 756 F.2d 392, involved the very same issue as that presented to this Court—does Section 1365(a) permit a citizen suit for past violations, or must the defendant be "in violation" of relevant standards, limitations and orders on the date the citizen suit is filed? After thoroughly discussing the history, meaning and purposes of Section 1365(a)[6] as it relates to the other provisions of the Clean Water Act, the Fifth Circuit Court of Appeals concluded:

> To summarize, the ordinary meaning of the words of the statute and its prior Supreme Court interpretation indicate that Section 1365 does not authorize citizens suits seeking either injunctive relief or the imposition of civil penalties where the defendant is not alleged to be in violation of an effluent standard, limitation or order. The section "authorizes only prospective re-

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[4]Summer v. Mata, 449 U.S. 539, 547 n. 2, 101 S.Ct. 764, 769 n. 2, 66 L.Ed. 722 (1981); Louisville & N. R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908); and Cameron v. Hodges, 127 U.S. 322, 8 S.Ct. 1154, 32 L.Ed. 132 (1888).

[5]McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1935); Diefenthal v. Civil Aeronautics Board, 681 F.2d 1039 (5th Cir. 1982), *cert. denied* 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed. 2d 956 (1983); Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975).

[6]33 U.S.C. 1365(a) provides in pertinent part that "any citizen may commence a civil action . . . against any person . . . who is alleged *to be in violation of*" the relevant standards, limitations, or orders. (Emphasis supplied.)

lief" even though "civil penalties . . . may be ordered by the court." 756 F.2d at 396[7]

The Sierra Club argues that the *Hamker* case is wrong and that the appellate judges misinterpreted the provisions of the Clean Water Act.[8]

This Court is not only bound by the *Hamker* decision, but the Court must note that it fully agrees with the interpretation placed on § 1365 in the majority opinion.[9]

IV The Court Has No Subject Matter Jurisdiction

Since the Court and Copolymer have questioned the Court's subject matter jurisdiction, the Sierra Club must affirmatively show that the Court has subject matter jurisdiction. Sierra Club has failed to demonstrate that the Court has subject matter jurisdiction in these cases. In each of the cases, the Sierra Club alleges that the defendants are in violation of an effluent standard, limitation or order at the time the suits were filed.[10] Since this allegation has been challenged by each of the defendants, the

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[7]Judge Jolly, in his opinion, emphasized on at least twenty separate occasions that the defendant must be "in violation" at the time the suit is filed in order for a citizen to file a suit under § 1365(a).

[8]On oral argument, counsel for Sierra Club stated that the same argument the Sierra Club was making to this Court was made to the Fifth Circuit Court of Appeals in an amicus brief on rehearing in the *Hamker* case. The *Hamker* Court obviously rejected these arguments.

[9]The Court does not believe that it is bound by the language in the concurring opinion regarding a suit filed against a "chronic episodic violator," 756 F.2d at 399, but even if this language applies, the facts as presented in the case sub judice fail to support the subject matter jurisdiction of the Court.

[10]The allegations are set forth in paragraph 19 of each complaint filed in these cases.

Sierra Club must present proof that the defendants were "in violation" at the time the suits were filed. However, the evidence[11] presented in these cases clearly and unequivocally shows that none of the defendants were in violation at the time the suits were filed.[12]

IV [sic] Conclusion

The Court finds that the defendants were not in violation of any standard, limitation or order at the time the suits were filed herein. Therefore, the Sierra Club is precluded from filing a citizens suit against the defendants under Section 1365(a) of the Act. Since the Court does not have subject matter jurisdiction, plaintiff's suits shall be dismissed.[13]

Baton Rouge, Louisiana, November 7, 1985.

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[11]The parties have filed numerous affidavits and exhibits into the record on the jurisdiction issue.

[12]During oral argument, the Court unsuccessfully attempted on numerous occasions to have counsel for the Sierra Club point out any violations of any defendant which were pending on the date the suits were filed. Not only did plaintiff fail to set forth these violations during oral argument, but the record clearly demonstrates there were no violations on the dates the suits were filed herein.

[13]The Court's dismissal will be without prejudice. As noted in *Hamker*, the plaintiff may have a state damage claim which may be brought in a state court. Hamker v. Diamond Shamrock Chemical Company, 756 F.2d 392, 396 (5th Cir. 1985). The Court expresses no opinion as to the validity of such a claim.

NOTICE MAILED TO:

DATE 11/8 BY PJ
Mr. Osborne
Byrd
Harburt
Cruilj
Lt
JG(6)

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
NOVEMBER 8, 1985
POLOZOLA, J.

SIERRA CLUB — CIVIL ACTION

VERSUS — NUMBER 85-147-B

MONOCHEM, INCORPORATED

(Received November 21, 1985)

This matter is before the court on the motion of the defendant Monochem, Incorporated ("Monochem"), to dismiss this case for lack of subject matter jurisdiction.

A review of the record, including affidavits and exhibits, reveal that Monochem was not "in violation" of an effluent standard, limitation or order at the time the present suit was filed. Therefore, for the reasons set forth in *Sierra Club v. Copolymer Rubber and Chemical Company, et al*, — F.Supp. — (M.D. La. 1985), this suit must be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

Therefore:

IT IS ORDERED that the motion of the defendant, Monochem, Incorporated, to dismiss the present suit for lack of subject matter jurisdiction be, and it is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff's suit be dismissed without prejudice.

/s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

NOTICE MAILED TO:

DATED 11/8 BY PJ
Osborne
Hallo
(6) Philip
LT.
JG.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SIERRA CLUB	CIVIL ACTION
VERSUS	NO. 84-3583
SHELL OIL COMPANY	SECTION "J"

JUDGMENT

(Filed November 4, 1985)

The Court having previously granted the motion of defendant to dismiss.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Shell Oil Company, against plaintiff, Sierra Club, dismissing said plaintiff's suit, with costs.

Dated at New Orleans, Louisiana, this 4th day of November, 1985.

/s/ Patrick E. Carr
United States District Judge

Supreme Court, U.S.
FILED
SEP 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-131

In The

Supreme Court of the United States

October Term, 1987

SIERRA CLUB,

Petitioner,

vs.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court below was correct in holding that a federal district court may dismiss a case on the merits if the plaintiff fails to raise a fact issue about whether a defendant was "in violation" of its permit when the action was filed as that term is defined under the Clean Water Act?

Whether the plaintiff, Sierra Club, had standing to bring this action?

Whether the notice provided by the Sierra Club pursuant to 33 U.S.C. § 1365 was adequate?

Whether 33 U.S.C. § 1365 is unconstitutional because it confers power of the executive branch of government upon citizens?

PARTIES

Petitioner is Sierra Club, a non-profit corporation organized under the laws of the State of California.

Respondent, Shell Oil Company, is a Delaware corporation with its principal place of business in Houston, Texas. All of Shell Oil Company's common stock is owned by SPNV Holdings, Inc., a Delaware corporation, whose stock is owned by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held 60 percent by Royal Dutch Petroleum Company and 40 percent by Shell Transport and Trading Company, a Public Limited Company in London, U.K. Shell Oil Company also has an interest in a number of companies. The following companies are affiliated with Shell Oil Company or one of its affiliates, but are not wholly owned subsidiaries:

Pecten Middle East Services Company
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mesbic Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Seadock, Inc.
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Thums Long Beach Company
Van Salt Water Disposal Company
WIDC (Wyoming Industrial Development Corporation)
Cortez Capital Corporation

George Newman & Company
Oil Companies Institute for Marine Pollution Compensation Limited
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
Locap, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Morrison Molded Fiber Glass Company
Xerkon Inc.
Huntsman Chemical Corporation

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
STATEMENT OF CASE	2
REASONS FOR DENYING THE WRIT	6
I. The Decision Below was Decided on the Specific Record Before the Appellate Court Consistent with Fifth and First Circuit Law	6
II. The Respondent Lacks Standing to Bring this Action	7
III. The Respondent Failed to Provide Adequate Notice	7
IV. Section 1365 of the Act is Unconstitutional in that it Grants Private Citizens the Authority to Exercise Executive Functions	9
A. Separation of Powers	9
B. Executive Function	9
C. Structure of the Clean Water Act	11
D. The Citizens Authority to Sue for Penalties is Unconstitutional	15
CONCLUSION	17
APPENDIX:	
Stipulation	App. 1
Notice Letter of January 20, 1984	App. 6

TABLE OF AUTHORITIES

Page

CASES

Baker v. Carr, 369 U.S. 186 (1962) 15

Bowsher v. Synar, 106 S. Ct. 3181 (1986) 9, 15

Buckley v. Valeo, 424 U.S. 1 (1976) 9, 10, 15

Chesapeake Bay Foundation v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987) 16

City of Highland Park v. Train, 519 F.2d 681 (7th Cir.), *Cert. denied*, 424 U.S. 927 (1975) (Clean Air Act) 8

Davis v. Passman, 442 U.S. 228 (1979) 16

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation and Natural Resources Defense Council, Inc., 791 F.2d 304 (4th Cir. 1986), *cert granted* — US —, 107 S. Ct. 872 (U.S. January 12, 1987) 1, 17

Hamker v. Diamond Shamrock Chemical Corporation, 756 F.2d 392 (5th Cir. 1985) 6

In Re Confiscation Cases, 74 U.S. 454 (1869) 10, 11

I.N.S. v. Chadha, 462 U.S. 979 (1983) 9, 15

Massachusetts v. United States Veterans Administration, 541 F.2d 119 (1st Cir. 1976) (Clean Water Act) 8

Middlesex County Sewerage District v. National Sea Clammers Association, 433 U.S. 1 (1981) 7, 13

Myers v. United States, 272 U.S. 52 (1926) 16, 17

Pawtuxet Cove Marine, Inc. v. Ciba-Geigy Corporation, 807 F.2d 1089 (1st Cir. 1986), petition for cert. filed (U.S. March 17, 1987) (No. 86-1562) 1, 6, 17

Reeger v. Mill Service, Inc., 593 F. Supp. 360 (W.D. Pa. 1984) (Clean Air and Clean Water Acts) 8

TABLE OF AUTHORITIES—Continued

Page

Sierra Club v. Shell Oil Company, 817 F.2d 1169 (5th Cir. 1987) 1

Springer v. Philippine Islands, 277 U.S. 189 (1928) 9

Student Public Research Group of New Jersey, Inc. v. Monsanto Company, 600 F. Supp. 1474 (D. N.J. 1985) 16

United States v. Cox, 342 F.2d 167 (5th Cir. 1965) *cert. denied*, 381 U.S. 935 (1965) 11

STATUTES

5 U.S.C. § 502 13

5 U.S.C. § 503 13

5 U.S.C. § 558(c) 2

33 U.S.C. § 1251(d) 12

33 U.S.C. § 1311(a) 2

33 U.S.C. § 1319 12

33 U.S.C. § 1319(d) 12

33 U.S.C. § 1342 2

33 U.S.C. § 1365 ..... i, 17

33 U.S.C. § 1365(a)(1)(2) 14

33 U.S.C. § 1365(b) 2

33 U.S.C. § 1365(c)(3) 14

33 U.S.C. § 1367 12

33 U.S.C. § 3302 14

33 U.S.C. § 3729 12

42 U.S.C. §§ 7401-7642 13

TABLE OF AUTHORITIES—Continued

Page

U.S. Constitution

Art. II, § 1, cl. 1 9

Art. II, § 2, cl. 2 ..... 11, 14

Art. III, § 3 14

Regulations

35 C.F.R. 15623 reprinted in 5 U.S.C.A. App. at 81 (1986) 12

40 C.F.R. § 122.6 2

Texts

Antonin Scalia, The Doctrine of Standing is an Essential Element of the Separation of Powers, 17 Suffolk U.L. Rev. 881 (1983) 14

Lewis, Environmentalist Authority to Sue Industry is Unconstitutional Under Separation of Powers Doctrine, 16 ELR 10101 (Apr. 1986) 14

Miller, Private Enforcement of Federal Pollution Control Laws (pts. 1-3), 13 ELR 10309 (Oct. 1983), 14 ELR 10063 (Feb. 1984), 14 ELR 10407 (Nov. 1984) 13

BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Shell Oil Company respectfully prays that this court deny the Sierra Club's petition for a writ of certiorari to review the judgment and opinion of the United States District Court of Appeals for the Fifth Circuit entered in *Sierra Club v. Shell Oil Company,* 817 F.2d 1169 (5th Cir. 1987) on May 29, 1987. While this court has granted a writ of certiorari in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation and Natural Resources Defense Council, Inc.,* 791 F.2d 304 (4th Cir. 1986), *cert granted* — US —, 107 S. Ct. 872 (U.S. January 12, 1987), (hereinafter *Gwaltney*), (No. 86-473) this case turns upon its own facts and is consistent with *Pawtuxet Cove Marine, Inc. v. Ciba-Geigy Corporation,* 807 F.2d 1089 (1st Cir. 1986), petition for cert filed (U.S. March 17, 1987) (No. 86-1562) (hereinafter *Pawtuxet*). Respondent respectfully submits that the decision of the Fourth Circuit in *Gwaltney* is incorrect.

STATEMENT OF THE CASE

The Sierra Club's presentation of Shell Oil Company's ("Shell") compliance record according to its Clean Water Act permit (National Pollutant Discharge Elimination System Permit, hereinafter NPDES) at its petroleum refinery in Norco, Louisiana, discloses the petitioner's failure to address the central factual determination made by the trial court, i.e., the plaintiff's failure to raise a fact issue concerning whether or not Shell was in violation of the Act at the time that the Complaint was filed. Shell's factual presentation of the case was uncontradicted in spite of the opportunity of the plaintiff to conduct extensive discovery for more than a year. The uncontradicted factual record before the trial court revealed the following permit and compliance history for Shell Oil Company's oil refinery in Norco, Louisiana.

Shell's Norco Refinery was issued its first NPDES permit under 33 U.S.C. § 1342 of the Clean Water Act in July, 1977. Although that permit expired under its terms on October 30, 1979, the permit remained in effect pursuant to the Administrative Procedures Act, 5 U.S.C. § 558(c), and 40 C.F.R. § 122.6 during pendency of Shell's application for a new permit. That second permit was issued on May 16, 1980; the third and current permit was issued on August 15, 1983.

On or about January 20, 1984, Sierra Club attorneys sent a letter ostensibly under 33 U.S.C. 1365(b) to notify Shell of the Sierra Club's intent to file suit to enforce the terms of Shell's NPDES permit at the Norco Refinery. Sierra Club filed its Complaint on July 24, 1984 alleging violations by Shell of the Clean Water Act, 33 U.S.C.

§ 1311(a). Specifically, the Sierra Club alleged 120 violations of Shell's NPDES permit at the Norco Refinery between January, 1980 and March, 1984. Sierra Club also alleged that violations had occurred subsequent to March, 1984. At the time the suit was filed Sierra Club had no evidence that Shell had violated its permit in any way after March 7, 1984.

Respondent will summarize the record reviewed by the appellate court with respect to Shell's compliance history on two (2) of the eight (8) parameters at issue in the litigation. A detailed discussion of these two (2) parameters is important to highlight the appellate court's thorough review of the record in order to determine whether a factual issue had been created by the Sierra Club's showing before the district court.

TOTAL SUSPENDED SOLIDS (TSS)

Since 1976 each of Shell's permits has contained dual limitations which placed a Daily Maximum and Daily Average limitation on the amount of pollutants that could be discharged from Shell's refinery. The TSS limitations in effect under Shell's second permit were more restrictive than the limitations of the first permit. While the second permit was in effect a total of forty-eight (48) exceedences were reported to the Environmental Protection Agency (hereinafter EPA). On August 15, 1983, the EPA issued Shell's third permit. Shell's third permit, however, contained higher limitations for TSS. After the issuance of the third permit, there was only one TSS Daily Maximum exceedence. That exceedence occurred on December 29, 1983 in the midst of the coldest weather experienced in

the Norco area in over twenty (20) years. No other TSS exceedences occurred between December 29, 1983 and February 7, 1985.[1] Any problem that may have existed with respect to the TSS limits was solved by the increased limitations granted by the EPA. At the time the complaint was filed, there was no continuing or recurring violation of the TSS parameter at Shell's Norco refinery.

CHROMIUM, HEXAVALENT AND TOTAL

Shell used chromates for the purpose of corrosion control in its water cooling towers at its Norco refinery. Between the approximate dates of January, 1980 and July, 1984, Shell's records submitted to the EPA reflect that there were a total of eighteen (18) exceedences of hexavalent chromium. In addition, during that same time period, there were a total of two (2) Daily Maximum exceedences of total chromium. The last chromate exceedance, a hexavalent chromium exceedence, occurred on March 7, 1984.

Sierra Club lawyers were advised in March, 1984 by William L. Caughman, Jr., Environmental Conservation Manager for the Norco refinery, that Shell was contemplating the elimination of chromates for corrosion control at the Norco refinery. Mr. Caughman recommended in

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1. The district court's ruling on Shell's Motion for Summary Judgment was based on various supporting materials. The supporting materials included three (3) affidavits from William L. Caughman, Jr., excerpts of the depositions of William L. Caughman, Jr., excerpts from R. E. Deister's deposition, a summary of the reported exceedences and the Stipulation of the Sierra Club. The material was presented in support of Shell's factual presentation of its case and was uncontroverted.

May, 1984, that a non-chromate corrosion control system be implemented. In June, 11984, Mr. Caughman's recommendation was accepted. By January, 1985, the Norco refinery was utilizing a non-chromate corrosion control system. Shell's use of a non-chromate corrosion control system at the refinery eliminated the likelihood that Shell would ever experience a recurring problem with the chromate parameters.

The Sierra Club made no further inquiry regarding chromates prior to filing its action in July, 1984. At the time Sierra Club filed its Complaint, it had no evidence that there had been any exceedences occurring between March 8, 1984 and July 21, 1984, the date the Complaint was filed. See App. at App. 1.

OTHER PARAMETERS

The remainder of Shell's compliance record merely reveals a variety of multiple, sporadic and past exceedences of different parameters during an extended time period. Of the five reported phenol exceedences, four occurred during a pipe rupture in 1981. The four TOC (Total Organic Carbon) exceedences reported in 1982 occurred at a separate outfall from the remainder of the exceedences. The evidence and testimony presented by Shell demonstrated that the Shell laboratory responsible for making the tests experienced a short period of time during which the elevated readings were attributed by the laboratory manager, R. E. Deister, to errors made by persons in charge of preparing the sample bottles used to conduct the tests. The records submitted by Shell to the EPA

demonstrated that there were a total of eleven (11) ph exceedences since January, 1980. However, the last ph exceedence prior to the filing of the Complaint occurred on June 23, 1982. Shell's records also indicated a total of 15 BOD (Biochemical Oxygen Demand) exceedences. Of that total, 7 occurred during unusually severe weather conditions in the Norco area in December, 1983 and January, 1984. The last BOD exceedence prior to the filing of the Complaint, occurred on January 16, 1984. There were no other exceedences of this parameter for more than six months prior to the date the plaintiff filed its Complaint.

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS DECIDED ON THE SPECIFIC RECORD BEFORE THE APPELLATE COURT CONSISTENT WITH FIFTH AND FIRST CIRCUIT LAW.

The Respondents' Opposition to the Petition for Certiorari addresses the propriety of the Appellate Court's ruling on the basis of the factual records and current Fifth and First Circuit law and those arguments will not be repeated here. The court is respectfully referred to the consolidated opposition for a recitation of all the applicable arguments. Respondent points out, however, that under the standards articulated by the Fifth Circuit in *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392 (5th Cir. 1985) and by the First Circuit in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), Petition for Cert. filed (U.S. March 17, 1987) (No. 86-

1562), the uncontradicted factual record before the district and appellate courts demonstrated that Shell was not in violation on or near the date the Complaint was filed. Petitioner simply failed to raise a genuine issue of material fact and the trial court granted a summary judgment for Shell. The Fifth Circuit found no error with the trial court's decision, and affirmed.

II. THE RESPONDENT LACKS STANDING TO BRING THIS ACTION

Respondent contends that the Petitioner does not have standing to bring this action. The arguments on standing are addressed in the consolidated opposition and will not be repeated here. The Court is respectfully referred to the consolidated brief for a full recitation of the applicable arguments.

III. THE RESPONDENT FAILED TO PROVIDE ADEQUATE NOTICE

Sierra Club's notice letter of January, 1984, cited forty-seven (47) alleged violations of the Act. See App. at App. 6. Respondent contends that the notice is deficient because it makes reference to alleged violations of expired permits and the notice cited twenty-five (25) alleged TSS violations of a limit which was subsequently increased. The notice letter on its face did not make any reference at all to a non-compliance under Shell's permit in effect at the time that the Complaint was filed. Only alleged violations of expired permits were cited.

As stated in the Supreme Court's decision in *Middlesex County Sewerage District v. National Sea Clammers Assn.*, 433 U.S. 1 (1981) notice is mandatory. Notice of

alleged violations relating to expired permits or limitations which are no longer applicable cannot support jurisdiction. The language which prohibits the filing of an action without giving proper notice has been held to be jurisdictional in several environmental contexts. *City of Highland Park v. Train,* 519 F.2d 681 (7th Cir.), *cert. denied,* 424 U.S. 927 (1975) (Clean Air Act); *Massachusetts v. United States Veterans Administration,* 541 F.2d 119 (1st Cir. 1976) (Clean Water Act); *Reeger v. Mill Service, Inc.,* 593 F. Supp. 360 (W.D. Pa. 1984) (Clean Air and Clean Water Acts). The purpose of the notice provision is to trigger governmental action thereby alleviating the need for judicial action. *Highland Park, supra* at 691. Recourse to the court is appropriate only when the administrative action taken is inadequate. *Massachusetts, supra* at 121.

The last item referenced by the Sierra Club in its notice letter is dated April, 1983. See App. at App. 7. On its face such a notice cannot be sufficient to "trigger" governmental action particularly in view of the reference within that notice to outdated limitations. The only concern which can be gleaned from the Sierra Club's notice is that the plaintiff was concerned about a problem related to an expired permit. Plaintiff's listing of more recent alleged violations in an appendix to its complaint is of no consequence since the Act requires notice before an action is filed. As stipulated by the Sierra Club at the time the complaint was filed, the Sierra Club had no factual evidence of any violations which occurred between March 8, 1984 and July 21, 1984. For the above reasons, the notice letter of January, 1984, was insufficient and failed to comply with the requirements of Section 1365(b) of the Act.

IV. SECTION 1365 OF THE ACT IS UNCONSTITUTIONAL IN THAT IT GRANTS PRIVATE CITIZENS THE AUTHORITY TO EXERCISE EXECUTIVE FUNCTIONS

A. Separation of Powers

The principle of separation of powers between the various branches of government is embedded in the very structure of the Constitution. The Constitution divides the powers of the Federal Government into three categories, Legislative, Executive and Judicial. *I.N.S. v. Chadha,* 462 U.S. 979, 951 (1983). As noted by the Supreme Court, the reason for dividing the powers of government was to "diffuse power the better to secure liberty." *Bowsher v. Synar,* 106 S. Ct. 3181 (1986).

B. Executive Function

The Constitution vests the Executive Power of government in the President. U.S. Const. Art. II, § 1, cl. 1. Enforcement of the laws is an executive function.

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. *Springer v. Phillippine Islands,* 277 U.S. 189, 202 (1928).

The Supreme Court in *Buckley v. Valeo,* 424 U.S. 1 (1976) struck down provisions of the Federal Election Campaign Act providing primary responsibility for conducting civil litigation in U.S. District Courts to an eight member Federal Election Commission composed of members appointed by the President as well as members appointed by the Senate and the House of Representatives. The Supreme

Court based its decision in *Buckley* on the doctrine of separation of powers between the branches of government and the constitutional requirement that only officers of the United States appointed pursuant to the Constitution may engage in the enforcement of the public law. *Buckley, supra.*, pp 118-143.

The authority of the Executive Branch to seek forfeiture of property to the government highlights the unique position of the executive in such matters. *In Re Confiscation Cases,* 74 U.S. 454 (1869), the Supreme Court considered whether an informer had a vested interest in a shop seized for violation of laws prohibiting the use of property to aid, abet or promote insurrection. At the time, the Act of August 6, 1861, provided that an informer was entitled to a moiety from the proceeds of a forfeiture. The court decided that the informer had no vested interest in the subject matter of the action and upheld the lower courts decision to permit dismissal of the libel in one instance and the reversal of a decree in favor of the United States at the request of the Attorney General in another. The total and complete autonomy of the executive in these matters has been clearly established.

> Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction and within the control of the Attorney-General. *Confiscation Cases,* at 458-459.

The penalty extracted by the government for violation of environmental provisions is no different than the penalty

of forfeiture imposed for violation of numerous laws established by Congress.[2]

The autonomy of the Executive Branch in matters related to the criminal enforcement of laws is likewise undisputed. In *United States v. Cox,* 342 F.2d 167, 171 (5th Cir. 1965) *cert. denied,* 381 U.S. 935 (1965) the Fifth Circuit Court of Appeals held in an *en banc* decision that a United States Attorney was justified in refusing an order of a district court to prepare and sign an indictment. In the *Cox* case the grand jury had made it clear that they wanted to bring indictments against certain persons. The U.S. Attorney refused and could not be ordered by the court to do so. The importance of this case is that it underscores the exclusive authority of the Executive Branch in the enforcement of the law to the exclusion of private citizens even if clothed with the mantle of authority granted to a grand jury. In matters relating to the enforcement of the law, the holdings in *Cox* and in *Confiscation Cases* support the proposition that the Executive Branch has the right to enforce civil laws to the exclusion of any right by private citizens to collect penalties.

C. Structure of the Clean Water Act

The Clean Water Act reflects in part that Congress worked within the Constitutional requirement providing that the laws of the United States be enforced by Officers of the United States in accordance with U.S. Const. Art. II, § 2, cl. 2. The Act grants to the administrator of the

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2. The CWA was amended on February 4, 1987, to provide for penalties in the amount of $25,000 per day for each violation.

EPA the authority to administer the Act. 33 U.S.C. § 1251(d). The Administrator, the head of the Agency, is appointed by the President with the advice and consent of the Senate. Reorg. Plan No. 3 of 1970, 35 C.F.R. 15623 reprinted in 5 U.S.C.A. App. at 81 (West Supp. 1986). Under the Act the administrator has broad powers to enforce the provisions of the law by administrative or judicial action. 33 U.S.C. § 1319. Under § 1319(d), the administrator may seek civil penalties in the amount of $10,000 per day for violation of permit conditions.[3] The Attorney General of the United States shall at the request of the administrator appear and represent the United States in civil and criminal actions filed under the Act. 33 U.S.C. § 1367. Officers or employees of the EPA are also authorized to appear and represent the United States under certain conditions. *Id.* The Attorney General is the head of the Department of Justice appointed by the President with

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3. Respondent acknowledges the existence of *qui tam* actions. Several statutes, such as the False Claims Act, 31 U.S.C. § 3729, as amended provide private citizens with a percentage of a recovery of any action for actions brought against persons who defraud the government. No court has yet addressed the constitutionality of *qui tam* actions in the context of a challenge based on the separation of powers doctrine. Significant differences exit between the *qui tam* statutes and citizen suits. Private citizens do not obtain an interest in the recovery, i.e., the penalty. The very essence of standing in environmental cases is predicated on an individualized injury and not based on securing a benefit for the public at large. Additionally, the need to provide incentives to private individuals is not present. Unlike the cases involving fraud, there is no need to encourage informers. All information necessary to file an action is provided to the government and available to the public. *Qui tam* actions do not support the constitutionality of citizen suits simply because the rationale for their existence is substantially different.

the advice and consent of the Senate. 5 U.S.C. § 503. The Department of Justice is an executive department of the government. 5 U.S.C. § 502. While the foregoing demonstrates the constitutional structure established by Congress to enforce the provisions of the Clean Water Act, Congress exceeded the constitutionally permissible limits when it chose to give private citizens the right to exercise an executive function: i.e., the right to collect a penalty presumably destined for the U.S. Treasury.[4]

It is important to note that many environmental statutes provide for dual enforcement by federal or state governments and for a private cause of action by citizens. The Clean Water Act was enacted in 1970[5] and has served as a model for many environmental statutes.[6] The difference between the Clean Air Act and the Clean Water Act is that private citizens may seek monetary penalties in addition to injunctive relief. This difference is significant because the Clean Water Act does not directly provide that penalties collected are payable to the United States Treasury.[7] Private citizens do not fall under the provisions applicable to custodians of public money who may be removed from office for failure to promptly deposit public money in the

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4. The Act on its face does not require a citizen to deposit penalties in the Treasury. However, the Supreme Court suggested in a footnote that the penalties collected by private citizens are payable to the government. *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 14 & n.25 (1981).

5. 42 U.S.C. §§ 7401-7642.

6. See Generally: Miller, *Private Enforcement of Federal Pollution Central Laws* (pts. 1-3). 13 ELR 10309 (Oct. 1983), 14 ELR 10063 (Feb. 1984), 14 ELR 10407 (Nov. 1984).

7. See footnote 4.

U.S. Treasury. 33 U.S.C. § 3302. More importantly, private citizens have not been appointed by the President to enforce environmental laws as required by the Constitution. U.S. Const. Art. II, § 2, cl. 2. The lack of authority and oversight over the activities of persons who exercise executive functions means that the Parsident cannot effectively meet his obligation to "take care that the Laws be faithfully executed." U.S. Const. art. II, § 3.[8]

By enacting a statutory scheme providing aggrieved citizens the right to sue for relief in connection with the enforcement of environmental laws, Congress brought the separation of powers and standing doctrines into consideration.[9] In so doing, Congress authorized private citizens to question and circumvent the Executive Branch's initiative and prosecutiorial discretion in certain areas. 33 U.S.C. § 1365(a)(1)(2). The concept that highlights the interplay between the separation of powers doctrine and congressional mandates for environmental protection is standing. Indeed, by permitting a broader interpretation of the constitutional standing requirements, individ-

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8. The problem is illustrated by a review conducted of settlements reached in 1983 involving citizen suits which revealed that in 90% of the cases environmental organizations and not the federal government received monetary payments. See Generally: Lewis, *Environmentalist Authority to Sue Industry is Unconstitutional Under Separation of Powers Doctrine,* 16 ELR 10101 (Apr. 1986). In February, 1987, Congress amended the Act to provide that consent decrees must be submitted to the Attorney General and the Administrator of the EPA. 33 U.S.C. § 1365(c)(3). The stated purpose of the provision is to protect the interests of the United States.

9. See Generally: Antonin Scalia, *The Doctrine of Standing is an Essential Element of the Separation of Powers,* 17 Suffolk U.L. Rev. 881 (1983).

uals can now bring before the courts a number of issues previously considered to be committed to the discretion of other branches of government.[10] While the purpose of the standing requirement has often been stated that it is "to assure that concrete adverseness which sharpens a presentation of issues," standing nevertheless requires that an individual have an injury in fact.[11] The existence of a personal stake in the litigation is the essence of standing. *Baker v. Carr*, 369 U.S. 186 (1962). It is the ability to particularize an injury that serves as a means to insure that policy decisions by the executive branch of government are subject to judicial review only when it is necessary to address a direct injury to an individual. Permitting private citizens to collect monetary penalties merely encourages interference with the prosecuturial discretion granted to an executive Branch of government and violates the delicate governmental balance sought to be established by the framers of the Constitution.

D. The Citizens Authority To Sue For Penalties Is Unconstitutional

In light of the Supreme Court's recently reaffirmed concerns over the need to maintain a clear separation of powers between the branches of government, this Court must concern itself with the question of who may engage in the executive function of collecting money for the government. *Synar, supra.; Chadha, supra.* Under the authorities cited in *Buckley, supra,* executive functions may be exercised only by officers of the United States subject

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10. *Id.* pp. 885-890.

11. *Id.* pp. 890-894.

to appointment and control of the President. Delegation of executive functions to private citizens by Congress is an unconstitutional act directly contrary to the Appointments Clause of the Constitution.[12]

The Constitution mandates those who enforce the laws of the United States be appointed by the President and subject to his direction and control.

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. *Myers v. United States*, 272 U.S. 52, 117 (1926).

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12. Two District Courts have considered a similar constitutional argument in the context of the Clean Water Act and has ruled against it. *Student Public Research Group of New Jersey, Inc. v. Monsanto Company*, 600 F. Supp. 1474 (D. N.J. 1985). The District Court in *SPIRG*, relied on *Davis v. Passman*, 442 U.S. 228, 241 (1979) to hold that Congress may vest enforcement power in whomever it pleases even if it acts unwisely. *Davis* held that an individual had an implied cause of action for damages under the Fifth Amendment based on her termination from employment as a staff member to a congressman for sex discrimination. *Davis* does not, however, stand for the proposition that Congress may authorize private citizens to perform the functions granted to the President by the Constitution. In *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987) the Court relied on the *Monsanto* case to approve the use of citizen suits and also reasoned that the separation of powers argument was not appropriate because the Legislative Branch did not retain Executive power for itself, but merely granted it to private individuals.

As stated by the Court in *Myers,* the President must appoint those who enforce the law as part of his constitutional duty to ensure the laws are adequately enforced.

> Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . .'' *Id.,* at pp. 163-164.

Congress may not avoid the Constitutional limitations of the Appointments Clause merely because it may be promoting a socially beneficial result. The principle of separation of powers embodied in the Constitution must be observed to insure the proper balance of power between the various branches of government including well intentioned but misguided attempts by Congress to relinquish the law enforcement function of the executive to private citizens. Therefore, this court must find that 33 U.S.C. § 1365 of the Clean Water Act is unconstitutional to the extent it seeks to delegate the exclusive authority of the executive branch to seek imposition of penalties for violation of environmental laws.

CONCLUSION

The writ of certiorari should not be granted in this case. Respondent submits that the decision by the Fifth Circuit in this case was correct and consistent with the First Circuit in *Pawtuxet.* Respondent submits that the Fourth Circuit's decision in *Gwaltney* is incorrect. Additionally, the decision of the Fifth Circuit may be upheld

given the Petitioner's lack of standing, its failure to give adequate notice, and the unconstitutionality of the citizen suit provision of the Clean Water Act. For the above reasons, Petitioner's writ of certiorari should not be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
AT NEW ORLEANS

SIERRA CLUB,

Plaintiff,

v.

SHELL OIL COMPANY,

Defendant.

Civil Action No. 84-3583

Sect. J MAG 2

STIPULATION

Plaintiff Sierra Club and Defendant Shell Oil Company ("Shell"), through their respective undersigned counsel, hereby agree to the following stipulated facts which shall be binding upon both parties and their representatives for the purposes of this action. It is specifically agreed by the parties that this stipulation is in lieu of the depositions of Sierra Club personnel and agents noticed by Shell on July 15, 1985, and scheduled pursuant to Magistrate Wynne's Minute Entry of July 26, 1985. The parties hereby stipulate as follows:

1. Shell prepares Discharge Monitoring Reports ("DMRs") and Non-Compliance Reports ("NCRs") and submits them, as required by federal regulation according to the terms of its NPDES permit, to the United States Environmental Protection Agency ("EPA").

2. In the fall of 1983, the National Resources Defense Council ("NRDC"), as representatives of the Sierra Club, examined and evaluated EPA NPDES discharge permit compliance files in several states, including Louisiana. The

NRDC reviewed information from the files of the EPA and the State of Louisiana, including DMRs, NCRs, two Notices of Deficiency dated February 21, 1979 and May 6, 1981, and a letter from Shell to EPA dated December 13, 1982, responding to deficiencies noted by EPA on November 29-30, 1982, a 1980 and a 1981 NPDES permit application, NPDES permits dated July 1977, May 1980 and August 1983, correspondence between Shell and EPA, and Louisiana state compliance and inspection reports. On the basis of the above review, the NRDC determined that Shell Oil at Norco, Louisiana, was a company with a pattern of permit non-compliance and that no diligent prosecution had been made by Federal or State authorities. The information collected by Sierra Club's representatives concerning Shell Oil's Norco, Louisiana, facility was forwarded to Sierra Club's counsel, the Center for Law in the Public Interest, in or around October of 1983. Shell does not concede the characterization of its permit history.

3. In or around December 1983 or January 1984, the Sierra Club Executive and Conservation Administration Committees in San Francisco, California, in consultation with the Sierra Club Legal Defense Fund, determined that Shell Oil, Norco, Louisiana should be notified of the Sierra Club's intent to file suit under the Clean Water Act to enforce the terms of Shell's NPDES permit, and authorized its counsel, the Center for Law in the Public Interest, to do so.

4. At this time, the Executive Committee of the Sierra Club was composed of Denny Shaffer, Michelle Perrault, Sandy Tepfer, Phil Hocker and Marty J. Fluharty. The Conservation Administration Committee of the Sierra Club was composed of Michael McCloskey, Phillip Berry and

Denny Shaffer. Mr. McClosky is the only member of either Committee employed by the Sierra Club, and at the time of the review discussed herein, served as its Executive Director.

5. On or about January 20, 1984, the Center for Law in the Public Interest sent a letter to representatives of Shell to notify Shell of its intent to file suit under 33 U.S.C. § 1365(b) to enforce the term of Shell's NPDES permit at the Norco, Louisiana refinery. This stipulation does not waive any objections Shell may have to the adequacy of such notice.

6. The Sierra Club's decision to send the letter described in paragraph 5 above was based on a review and analysis by the NRDC and Sierra Club's counsel in consultation with the Sierra Club Legal Defense Fund described in paragraph 3 above.

7. In or about April 1984, the Center for Law in the Public Interest made an FOIA request for all DMRs and NCRs filed by Shell with EPA since April 1983. In May 1984, the Center for Law in the Public Interest obtained DMRs covering the period of time from April 1983 to February 1984, and NCRs covering the period of time from April 1983 to March 1984. No additional requests for DMRs and NCRs were made by Sierra Club or its counsel to the EPA until after the filing of the lawsuit.

8. On or about March 13, 1984, representatives of the Center for Law in the Public Interest met with William Caughman, manager of the Environmental Conservation Department, Shell-Norco refinery, and Shell employees Charles Bland and Cynthia Graham, for the purpose of discussing the permit exceedances reflected in the DMRs and

the purported justifications therefor reflected in the NCRs.

9. As a result of this meeting, Sierra Club requested that they be sent the most recent DMRs and NCRs. On April 12, 1984, Shell sent to Sierra Club DMRs and NCRs from April 1983 through February 1984 and a December 1983 Bioassay report.

10. Prior to the filing of this action, the investigation and inquiry into the Shell-Norco permit exceedances made by the Sierra Club's representatives and its counsel was composed of the review of the records described in paragraphs 1, 2, 7 and 9 hereof and the meeting described in paragraph 8 hereof.

11. Prior to the filing of the Complaint, the information and documents described in paragraphs 1, 2, 7, 8 and 9 were reviewed and analyzed by Sierra Club's counsel. At the time the Complaint was filed, neither the Sierra Club nor its counsel had any factual evidence of any violation of Shell's NPDES Permit (LA0003522) other than the information reflected in the DMRs, NCRs and Notices of Deficiency described in paragraphs 1, 2, 7 and 9 hereof.

12. At the time the complaint was filed, the Sierra Club had no factual evidence of any violation which occurred between March 8, 1984 and July 21, 1984, other than as stated in paragraphs 1, 2, 7, 8 and 9.

13. At the date of these stipulations, the Sierra Club has no evidence of any violation occurring between the dates of March 8, 1984 and July 21, 1984.

Respectfully Submitted,

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APPROVED AND SO ORDERED:

....

Date UNITED STATES MAGISTRATE

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January 20, 1984

W. L. Caughman, Jr.
Manager, Environmental Conservation
Shell Oil Company
P. O. Box 10
Norco, LA 70079

Dear Mr. Caughman:

Section 505(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the filing of a citizens suit in federal district court under § 505 (a) of the Act, an alleged violator, the Environmental Protection Agency and the State in which the alleged violations occur must be given notice of the alleged violations.

The Sierra Club hereby places you on notice, pursuant to 33 U.S.C. § 1365(b), that a review of your discharge monitoring reports indicates that, Shell Oil Co., Norco Refinery has violated and continues to violate "an effluent standard or limitation" under § 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with NPDES/SPDES ("Section 402") permit number LA000-3522, in the following respects:

Outfall	Date	Permit Limitation	Violation
002	Jan. 1981	Hexavalent Chromium avg. 1.9 lbs/day	7.3 lbs/day
002	Jan. 1980	Hexavalent Chromium max. 4.1 lbs/day	27.4 lbs/day
002	Dec. 1980	Hexavalent Chromium max. 3.7 lbs/day	5.2 lbs/day
002	Feb. 1981	Hexavalent Chromium max. 3.7 lbs/day	4.7 lbs/day
002	Jan. 1983	Hexavalent Chromium max. 3.7 lbs/d	5.0 lbs/d
002	March 1983	Hexavalent Chromium max. 3.7 lbs/d	4.0 lbs/d
002	April 1983	Chromium max. 46 lbs/d	50 lbs/d
002	Nov. 1980	pH max. 9.0 std units	9.8 s.u.
002	May 1981	pH max. 9.0 std units	9.6 s.u.
002	July 1981	pH max. 9.0 std units	11.0 s.u.
002	June 1982	pH max. 9.0 std units	9.7 s.u.
002	June 1981	Phenols avg. 11.0 lbs/d	227.0 lbs/d
002	June 1981	Phenols avg. 22.7/d	1,338 lbs/d
002	Aug. 1980	BOD^5 max. 3,436 lbs/d	3,561 lbs/d
002	July 1981	BOD^5 max 3,436 lbs/d	6,140 lbs/d

Outfall	Date	Permit Limitation	Violation
002	Jan. 1982	BOD^5 max. 3,436 lbs/d	4,930 lbs/d
002	Aug. 1982	BOD^5 max. 3,436 lbs/d	3,690 lbs/d
002	June 1981	COD avg. 13,370 lbs/d	28,600 lbs/d
002	April 1983	COD max. 25,792 lbs/d	36,500 lbs/d
002	April 1980	TSS avg. 1,661 lbs/d	2,240 lbs/d
002	May 1980	TSS avg. 1,519 lbs/d	1,600 lbs/d
002	July 1980	TSS avg. 1,519 lbs/d	1,700 lbs/d
002	Aug. 1980	TSS avg. 1,519 lbs/d	1,880 lbs/d
002	Feb. 1981	TSS avg. 1,519 lbs/d	2,124 lbs/d
002	April 1981	TSS avg. 1,519 lbs/d	1,600 lbs/d
002	May 1981	TSS avg. 1,519 lbs/d	2,100 lbs/d
002	June 1981	TSS avg. 1,519 lbs/d	2,700 lbs/d
002	July 1981	TSS avg. 1,519 lbs/d	1,800 lbs/d
002	March 1980	TSS max. 2,598 lbs/d	4,890 lbs/d
002	April 1980	TSS max. 2,598 lbs/d	6,680 lbs/d
002	May 1980	TSS max. 2,376 lbs/d	4,090 lbs/d
002	July 1980	TSS max. 2,376 lbs/d	2,600 lbs/d
002	Aug. 1980	TSS max. 2,376 lbs/d	3,200 lbs/d
002	Oct. 1980	TSS max. 2,376 lbs/d	2,480 lbs/d
002	Feb. 1981	TSS max. 2,376 lbs/d	8,400 lbs/d
002	May 1981	TSS max. 2,376 lbs/d	3,100 lbs/d
002	June 1981	TSS max. 2,376 lbs/d	6,900 lbs/d
002	July 1981	TSS max. 2,376 lbs/d	6,000 lbs/d
002	Aug. 1982	TSS max. 2,376 lbs/d	2,400 lbs/d
002	Sept. 1982	TSS max. 2,376 lbs/d	3,301 lbs/d
002	Oct. 1982	TSS max. 2,376 lbs/d	3,200 lbs/d
002	Nov. 1982	TSS max. 2,376 lbs/d	2,700 lbs/d
002	Feb. 1983	TSS max. 2,376 lbs/d	3,900 lbs/d
002	April 1983	TSS max. 2,376 lbs/d	6,600 lbs/d
004	April 1982	TOC max. 5 mg/l	6.0 mg/l
004	June 1982	TOC max. 5 mg/l	9.0 mg/l
004	Aug. 1982	TOC max. 5 mg/l	9.0 mg/l

We believe this NOTICE OF INTENT TO SUE sufficiently states the grounds for complaint. If, however, you have any questions or wish to discuss the matter, please contact us.

Sincerely,

/s/ Signature illegible

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No. 87-131

In the

Supreme Court of the United States

October Term, 1987

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

SIERRA CLUB,

Petitioner,

v.

SHELL OIL,

Respondent.

SIERRA CLUB,

Petitioner,

v.

MONOCHEM, INC.,

Respondent.

SIERRA CLUB,

Petitioner,

v.

COPOLYMER RUBBER AND CHEMICAL CORP., et al.,

Respondent.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY SIERRA CLUB'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED 3

SUMMARY OF ARGUMENT 3

I. The Decision Below Is Correct. Gwaltney Is Erroneous. 5

II. The Words "To Be in Violation" in 33 U.S.C. § 1365(a) Do Not Refer to Past Violations that Cease Prior to the Commencement of the Lawsuit. 9

A. Effluent Limitations Are Established on a Parameter by Parameter and Outfall by Outfall Basis. 9

B. "In Violation" Means an Ongoing Violation of an Effluent Limitation for a Particular Parameter at a Particular Outfall. 10

C. The CWA Legislative History Supports the Decision Below. 14

D. A Citizen's Authority to Enforce the Clean Water Act Is Not Coextensive With that of the Government. 20

E. The First and Fifth Circuits' Interpretation of the Words "In Violation" Is Required to Avoid Serious Constitutional Questions. 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 25

American Mining Congress v. Environmental Protection Agency, No. 85-1206 slip op. (D.C. Cir. July 31, 1987) 19

American Petroleum Institute v. Environmental Protection Agency, 661 F.2d 340 (5th Cir. 1981) 23

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 15

Anderson v. Liberty Lobby, Inc., — U.S. —, 106 S.Ct. 2505 (1986) 6

Baker v. Carr, 369 U.S. 186 (1962) 26

Burlington Northern Railroad Co. v. Oklahoma Tax Commission, — U.S. —, 107 S.Ct. 1855 (1987) ... 15

Chesapeake Bay Foundation and Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304 (4th Cir. 1986), cert. granted, — U.S. —, 107 S.Ct. 872 (U.S. January 12, 1987) No. 86-473 ..... *passim*

Chrysler Corporation v. Brown, 441 U.S. 281 (1979) ... 18

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 16, 18, 20

Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987) 18

E. I. du Pont de Nemours & Company v. Train, 430 U.S. 112 (1977) 18

TABLE OF AUTHORITIES—Continued

Page

Eagle-Picher Industries v. United States EPA, 759 F.2d 922 (D.C. Cir. 1985) 15

Environmental Protection Agency v. California Ex Rel. State Water Resources Control Board, 426 U.S. 200 (1976) 9

Environmental Protection Agency v. National Crushed Stone Association, 449 U.S. 64 (1980) 9

FAIC Securities, Inc. v. U.S., 768 F.2d 352 (D.C. Cir. 1985) 14

FMC Corporation v. Train, 539 F.2d 973 (4th Cir. 1976) 23

Friends of the Earth v. Consolidated Rail Corporation, 768 F.2d 57 (2d Cir. 1985) 12, 16

Garcia v. CECOS International, Inc., 761 F.2d 76 (1st Cir. 1985) 2

Garcia v. United States, 469 U.S. 70 (1984) 16

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 25

Hamker v. Diamond Shamrock Chemical Company, 756 F.2d 392 (5th Cir. 1985) 2, 3, 7, 14

I.N.S. v. Cardoza Fonseca, — U.S. —, 107 S.Ct. 1207 (1987) 15

Los Angeles v. Lyons, 461 U.S. 95 (1983) 25

Marathon Oil v. Environmental Protection Agency, 564 F.2d 1253 (9th Cir. 1977) 22

Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1 (1981) 17, 26

Monterey Coal v. Federal Mine Safety and Health Review, 743 F.2d 589 (7th Cir. 1984) 16, 17

TABLE OF AUTHORITIES—Continued

Page

National Association of Greeting Card Publishers v. United States Postal Service, 462 U.S. 810 (1983) 19

Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1974) 17

National Small Shipments v. Civil Aeronautics Board, 618 F.2d 819 (D.C. Cir. 1980) 15

Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corporation, 807 F.2d 1089 (1st Cir. 1986), pet. for cert. filed (U.S. March 17, 1987) (No. 86-1562) ..... *passim*

Regan v. Wald, 468 U.S. 222 (1984) 15

Richards v. United States, 369 U.S. 1 (1962) 14

Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980) 19

Rubin v. United States, 449 U.S. 424 (1981) 14

Sierra Club v. Shell Oil, 817 F.2d 1169 (5th Cir. 1987) ..... *passim*

Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977) 18

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 25

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 14

Tull v. United States, — U.S. —, 107 S.Ct. 1831 (1987) 21

United States Department of State v. Washington Post Co., 456 U.S. 595 (1982) 18

United States v. Locke, 471 U.S. 84 (1985) 14, 15

TABLE OF AUTHORITIES—Continued

Page

United States v. Oregon, 366 U.S. 643 (1961) 14

United States v. Roger, 466 U.S. 475 (1984) 14

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 25

Walls v. Wastewater Resource Corporation, 761 F.2d 311 (6th Cir. 1985) 2

Warth v. Seldin, 422 U.S. 490 (1975) 25

Weyerhaeuser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) 12

Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981) 5

CONSTITUTION

U.S. Constitution, Article III 24

STATUTES

F.R.C.P. 12(b)(1) 5, 6

28 U.S.C. 1345 21

28 U.S.C. 1355 21

33 U.S.C. § 1319(a) 20, 21

33 U.S.C. § 1319(b) 20, 21

33 U.S.C. § 1319(d) 20, 21

33 U.S.C. § 1342 ..... 1, 9

33 U.S.C. § 1342(k) 9

33 U.S.C. § 1365 ..... 2, 8, 12, 21, 22

33 U.S.C. § 1365(a) 1, 5, 9

TABLE OF AUTHORITIES—Continued

Page

33 U.S.C. § 1365(a)(1) 10, 13, 16

33 U.S.C. § 1365(b) 2

33 U.S.C. § 1365(b)(1)(A) 10

42 U.S.C. § 7401 *et seq.* 17

REGULATIONS

40 C.F.R. § 122.41(l)(4)(i) 10, 13

40 C.F.R. § 122.41(l)(6) 10

40 C.F.R. § 122.41(l)(7) 10

40 C.F.R. § 122.44(l) 13

LEGISLATIVE HISTORIES

A Legislative History of the Clean Air Amendments of 1970 (1974) 17

A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) 14, 16, 17, 19

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Allied Corporation; Bercen, Inc.; Copolymer Rubber & Chemical Corporation; Formosa Plastics Corporation, Louisiana, Inc.; Monochem, Inc.; and Shell Oil Company, respectfully pray that the petition for a writ of certiorari herein be denied.

This Court has granted a writ in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, which presents nearly identical questions of law. The decision in that case will, in all likelihood, affect the future of these cases. Through this Opposition, Respondents seek to present their arguments as to why the decision by the Court of Appeals in *Gwaltney* was in error and as to why the petition herein should be denied.

STATEMENT OF THE CASE

In the action below, the Sierra Club appealed three separate judgments of two federal district courts dismissing the Sierra Club's "citizen suits" against the six Respondents for alleged violations of their NPDES (National Pollutant Discharge Elimination System) permits issued under the authority of the Clean Water Act (CWA), 33 U.S.C. Section 1342. Suits against five of the Respondents were dismissed for lack of subject matter jurisdiction, and the sixth suit was dismissed on summary judgment. The Court below [*Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987) Petitioners' Appendix at 1 (hereinafter "*Shell Oil*")] affirmed the district courts' dismissals, but not on jurisdictional grounds. Instead, it held that even if a plaintiff has properly alleged an ongoing violation for pur-

poses of the citizen suit provision, 33 U.S.C. Section 1365 (a), but, on summary judgment, fails to demonstrate a genuine factual issue as to whether a defendant is "in violation" when suit is filed, the plaintiff has failed to prove an essential element of its cause of action and the court should grant judgment on the merits.

As part of a nationwide campaign of citizen enforcement of the CWA, and after a scanty, generalized and out-of-date review, the Sierra Club sent Notices of Violation to more than twenty Louisiana industries, including the six Respondents. These Notices of Violation are required to be sent to the alleged violator, the State, and the Environmental Protection Agency (EPA), pursuant to 33 U.S.C. Section 1365(b), at least sixty (60) days prior to the commencement of any litigation. The purpose of the required 60-day notice is to allow EPA an opportunity to commence enforcement proceedings, if warranted, and to allow the discharger to come into compliance voluntarily and to thereby avoid the citizen action.[1]

Subsequent to the Notices of Violation, these suits were filed. During the pendency of these actions, the Fifth Circuit reached its decision in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). Based upon the *Hamker* decision, the defendants in the six cases challenged the district courts' jurisdiction over the Sierra Club's enforcement actions. In each case, the defendants submitted evidence to show that they did not commit any violations on the dates the suits were filed and that they were not "chronic episodic" violators within the meaning of Judge

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[1] *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 396 (5th Cir. 1985); *Walls v. Wastewater Resource Corp.*, 761 F.2d 311, 316-317 (6th Cir. 1985); *Garcia v. CECOS International, Inc.*, 761 F.2d 76, 82 (1st Cir. 1985).

Williams' concurring opinion in *Hamker*. In each case, the district courts found that the Sierra Club failed to produce evidence that the defendants were "in violation."

On appeal, the Fifth Circuit upheld the dismissal of each of the cases and found that, 817 F.2d at 1173:

> "the uncontradicted evidence in these cases demonstrated only past, sporadic or largely unconnected permit violations by each of the appellees. Not only was none of the violations ongoing at the date Sierra Club filed suit in either a "chronic episodic" or actual sense, but Sierra Club never attempted to establish, and in fact eschewed the possibility that there might be any requirement of demonstrating the ongoing or chronic nature of such violations. Sierra Club's proof failed to comport with its pleadings."

———o———

REASONS WHY SIERRA CLUB'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Summary of Argument

The decision below and the decision in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corporation*, 807 F.2d 1089 (1st Cir. 1986) petition for cert filed (U.S. March 1987) no. 86-1562, (hereinafter *Pawtuxet Cove*) are consistent and do not conflict.[2] The decision below is in conflict with the de-

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[2] Indeed, the court below cited *Pawtuxet Cove* with approval, *Shell Oil*, 817 F.2d at 1175, App. at 14, and in part relied upon it. The Sierra Club has mischaracterized the holding in *Pawtuxet Cove* in an attempt to find a conflict where none exists.

The holding in *Pawtuxet Cove* is that allegations in a complaint "indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently

(Continued on following page)

cision of the Fourth Circuit in *Chesapeake Bay Foundation & Natural Resources Defense Council, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), cert granted — US —, 107 S.Ct. 872 (U.S. January 12, 1987) (No. 86-473) (hereinafter *Gwaltney*).

This Court will shortly hear argument in *Gwaltney*. If the *Gwaltney* decision is affirmed, the instant cases should

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(Continued from previous page)

done with, that would not warrant one" are necessary for jurisdiction under the citizen suit provision. 807 F.2d at 1093-94. This holding is fully consistent with the holding of *Shell Oil*.

After finding jurisdiction, the *Shell Oil* court went on to consider whether, based on the undisputed facts, the defendants were entitled to summary judgment. This, the *Pawtuxet Cove* did not do because it had dismissed the citizen suit for lack of jurisdiction based on the allegations in the complaint.

In dicta, apparently relied upon by Sierra Club in order to create a conflict between the circuits, *Pawtuxet Cove* made the observation that, 807 F.2d at 1094:

> A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.

By "judged objectively," the court clearly was referring to its directions to the district courts earlier in the same paragraph:

> In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations.

This is precisely the standard employed by the *Shell Oil* court in evaluating whether, based on the undisputed facts, there was a cause of action. All the *Pawtuxet Cove* dicta means is that it is possible that there may be jurisdiction, and there may be a cause of action, in a case where for a variety of reasons an injunction proves unobtainable. In that event, civil penalties may still be appropriate. This is an unexceptionable proposition, and nothing in *Shell Oil* is to the contrary. Certainly, the nonexistent conflict between *Shell Oil* and dicta in *Pawtuxet Cove* is not an adequate basis for a grant of a writ of certiorari.

be remanded to the Fifth Circuit for reconsideration in light of such decision. If the decision in *Gwaltney* is reversed, as we believe it should be, then this writ should be denied. Because of the central importance of *Gwaltney,* this Opposition will address many issues pertinent to the Court's consideration of *Gwaltney.* It is respectfully submitted that the decision in *Gwaltney,* holding that CWA citizen suits are available for solely past violations, is simply incorrect, as set forth in both *Pawtuxet Cove* and the decision below and for the reasons set forth in this opposition, infra.

I. The Decision Below Is Correct. Gwaltney Is Erroneous.

In its petition for certiorari, Sierra Club completely misstates the decision by the Fifth Circuit below by arguing that the Fifth Circuit opinion was based upon jurisdictional issues. In fact, as set forth in Section I of the Opinion, the Court's decision was based, not upon a lack of jurisdiction, but upon the merits. As stated by the Court, 817 F.2d at 1172:

> "Thus, '[w]here the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.' *Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir. 1981) . . . .
>
> As a result, when a plaintiff has alleged an ongoing violation for purposes of Section 1365(a), but he fails to demonstrate a fact issue about whether a defendant is 'in violation,' the court should grant summary judgment for the defendant on the merits under Fed.R.Civ.

> P. 56, instead of dismissing for want of jurisdiction under Fed.R.Civ.P. 12(b)(1) . . . .
>
> . . . Consequently, dismissing some of the cases for lack of jurisdiction was tantamount to summary judgment against Sierra Club on the merits of the critical issue of appellee's being 'in violation' when the actions were filed. No reversible error follows from this procedural flaw."

Holding that "in violation" is an essential part of the cause of action and thus "material" within the meaning of Rule 56, Federal Rules of Civil Procedure[3], the Fifth Circuit affirmed the district courts' dismissals because the Court concluded, after a careful and detailed factual review, that defendants were not "in violation" at the time the suits were filed and that there was no genuine issue as to this material fact. Thus, the decision below had nothing to do with jurisdiction, allegations in the complaint, good faith pleadings, or similar matters. Sierra Club just failed to demonstrate the existence of a genuine issue of material fact essential to its cause of action.

Well pleaded allegations in a complaint that a discharger is "in violation" may alone be sufficient to overcome a Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of jurisdiction. However, as the *Shell Oil* court noted, that is simply not enough. A plaintiff must thereafter submit evidence that there is a material issue of fact as to whether the defendant is "in violation" when faced with a Rule 56 motion for summary judgment, or the equivalent. Failure to show the existence of this material fact issue results, as

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[3]See *Anderson v. Liberty Lobby, Inc.*, — U.S. —, 106 S.Ct. 2505 (1986).

it did in the cases below, with the dismissal of the suit; not for lack of jurisdiction, but because plaintiff failed to create a genuine issue regarding facts essential to its cause of action.

A comparison of the language used by the Courts in *Pawtuxet Cove, Shell Oil,* and the concurring opinion of Judge Williams in *Hamker* makes it clear that the tests for "in violation" are essentially identical in each. One need only to compare the injunction standards set forth in *Pawtuxet Cove,* the "chronic episodic violator" test defined by Judge Williams in his concurring opinion and the factual analysis and its application to the term "in violation" in *Shell Oil.* None would allow private enforcement actions to proceed where there were solely past violations. Each would require an analysis of the nature and cause of the violations and whether or not steps had been taken by the discharger to remedy the situation such that the likelihood of repetition of those violations was sufficiently great to warrant the relief.[4]

Under these analyses, if a discharger merely "turns off the spigot" without taking any steps to correct the underlying cause of the exceedences which make up the continuing violation, it is "reasonable to believe that mis-

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[4]The record is replete with examples of why the Sierra Club was unable to prove that defendants were in violation "when suit was filed." For instance, Bercen, Inc. has not had any violations from any outfall listed in the complaint since October, 1984, over six months prior to suit being filed. Formosa Plastics had been issued a new permit before suit was filed which had significantly different effluent limitations than in the prior permit. Thus, there is no reasonable likelihood that its previous exceedences would continue. Copolymer tested 10,617 samples in the 12 months prior to suit, and found only 11 exceedences (some of which may not have been permit violations but excused upsets). Those 11 exceedences resulted from 7 separate and unrelated causes and not from any chronic problem.

conduct will continue and a citizen's suit may go forward." However, if the causes of the exceedence have been remedied, or the discharge was an isolated or infrequent event, or the problem was caused by equipment failure which was repaired, unusual weather or other similar unexpected causes, then it is not reasonable to believe that these "violations" will continue and a citizen suit is subject to dismissal. In the cases below, the facts, as found by the district courts and the Court of Appeals, simply do not support a cause of action under 33 U.S.C. § 1365.

If the facts are sufficient to authorize a court to issue an injunction against the chronic episodic or continuing violator at the time suit is filed (though an injunction may not be ultimately granted because the problem was corrected after suit was filed, or for equitable reasons, or otherwise), then civil penalties are available as an additional sanction for those violations, including those occurring prior to suit, which make up the continuing or renewed violations for which injunctive relief is available. That is the reasoning of the *Hamker* court, the *Pawtuxet Cove* court and the *Shell Oil* court.

The Sierra Club and the *Gwaltney* court have taken the extreme position—that citizen suits may be instituted and maintained for solely past violations. If solely past violations are sufficient to provide a citizen with a cause of action under 33 U.S.C. § 1365, then *each* exceedence of any permit limitation would form the basis for a suit no matter what the cause of the violation or whether it has been corrected, and no matter what the record of the discharger. Under this reasoning there could be a separate suit by different plaintiffs for each past violation. The result could be a massive burden on the federal courts and little, if any, improvement to the environment. Such a position is clearly unreasonable and unsupported by the statutory language.

The decision in *Shell Oil* below is consistent with the decision in *Pawtuxet Cove* and both are proper interpretations of the statutory language. The decision by the court in *Gwaltney* is simply wrong and inconsistent with the statutory language. Therefore, certiorari should be denied in the instant case and *Gwaltney* should be reversed.

II. The Words "To Be In Violation" In 33 U.S.C. § 365(a) Do Not Refer To Past Violations That Cease Prior To The Commencement Of The Lawsuit

A. Effluent Limitations Are Established on a Parameter by Parameter and Outfall by Outfall Basis

Effluent limitations, which are developed for an industrial category or subcategory, are transformed into limitations for an individual plant within the category or subcategory by incorporation into the terms and conditions of an NPDES permit issued to the discharger. 33 U.S.C. § 1342; *Environmental Protection Agency v. National Crushed Stone Association,* 449 U.S. 64, 70 (1980) (quoting *Environmental Protection Agency v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 205 (1976)). If a discharger is in compliance with the effluent limitations contained in its NPDES permit it is deemed to be in compliance with the CWA. 33 U.S.C. § 1342(k).

A single industrial facility may have numerous point sources of discharge. These "outfalls" may serve a single process unit or multiple units, single or multiple treatment facilities, or may only carry stormwater runoff. See *Shell Oil,* 817 F.2d at 1173. Due to the unique process and treatment arrangement at each plant, when incorporating effluent limitations into permits, EPA develops separate conditions for each pollutant at each outfall. This is necessarily so if effluent limitations are to be technology-based.

Also, because the treatment system for an outfall may be unrelated to the treatment system for any other outfall, an exceedence of a permit parameter (effluent limitation) at one outfall is not an exceedence of any parameter at another outfall even if the same pollutant is involved. Stated simply, when determining whether a permittee has violated an effluent limitation, one must look at each parameter at each outfall independently.[5]

B. "In Violation" Means an Ongoing Violation of an Effluent Limitation for a Particular Parameter at a Particular Outfall

Under *Shell Oil,* the role of the district court in determining whether the defendants are "in violation" is simple. The court first looks at the violations alleged in the 60-day notice letter [33 U.S.C. § 1365(b)(1)(A)] and the complaint. It then compares the violations alleged with the discharge monitoring reports ("DMRs")[6] and other written communications between the administrative agencies and the discharger[7], the documents in the agency

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[5]This is supported by the very notices given by the Sierra Club in these cases. Each alleged violation is listed on an outfall by outfall and parameter by parameter basis.

[6]40 C.F.R. § 122.41(l)(4)(i).

[7]There are several other types of reports used by EPA to assist in this determination. For example, 40 C.F.R. § 122.41(l)(6) requires the permittee to orally report certain instances of noncompliance within 24 hours. The oral report must be followed by a written report which indicates the cause of the noncompliance, whether the noncompliance has been corrected and must include a description of measures planned to prevent a recurrence.

Other instances of noncompliance not falling with these categories must be reported on Noncompliance Reports (NCRs) at the same time the DMRs are submitted. The NCRs must also contain a description of the cause of the noncompliance, and whether it has been corrected, and measures planned to prevent a recurrence. 40 C.F.R. § 122.41(l)(7).

enforcement files, and the other relevant evidence, including the discharger's explanations of the violations and the actions taken to correct them. Once it has reviewed this information, the court then determines whether any of the violations listed in the notice letter and complaint are part of a pattern of violations of a particular parameter at a particular outfall which exists around the time suit was filed.

If there is such a pattern, and the discharger is unable to show that there has been a *bona fide* correction of the cause of those violations or the problem was otherwise remedied prior to suit being filed, then there is sufficient basis for the issuance of an order enforcing that particular permit limitation and for the award of appropriate civil penalties for those violations of that particular permit limitation which make up the pattern of violation. If there is not a *bona fide* correction of the discharge problem, then the discharger is not in compliance because it has not installed, properly operated and maintained the necessary control equipment to comply with the discharge parameters of its permit. If, however, there is no pattern of violations or the pattern is broken prior to suit being filed as a result of either a *bona fide* correction of the discharge problem, or the issuance of a new permit or other reason which indicates it is unlikely that there will be a recurrence of the previous pattern of violations, then there is no basis for a finding that the discharger is "in violation" and the judgment should issue for the discharger.

Sierra Club would argue that a variety of unrelated exceedences, involving different outfalls and different para-

meters and resulting from unrelated causes is sufficient to establish liability under 33 U.S.C. § 1365. This position ignores the fact that citizen suits are intended to address specific, not generalized violations. *Friends of the Earth v. Consolidated Rail Corporation,* 768 F.2d 57, 63 (2d Cir. 1985).

The argument that a permit is the equivalent of an effluent limitation merely begs the question of what is meant by "in violation." A permittee is "in violation" of its permit only if it is "in violation" of a condition in that permit. The ultimate determination of whether the permittee is "in violation" still depends upon whether there are unremedied problems such that future exceedences are likely. If *isolated and unrelated* exceedences make a permittee a "chronic episodic" or continuing violator, then practically all dischargers will be subject to citizen suits and the Congressional purpose that citizen suits serve as a tool to bring about abatement of ongoing violation would be lost.

The Sierra Club also misconstrues the careful consideration to the nature of the violations given by the Court of Appeals below as being "excuses" for those past violations. Petition at 22. The Court of Appeals in no way "excused" any past violations. Rather, it carefully evaluated those past violations to determine whether they could reasonably be construed to suggest an ongoing problem—that is, the Court sought to determine if the discharger was still "in violation" when the suit was filed.[8]

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[8]Therefore, the claimed conflict with *Weyehaeuser v. Costle,* 590 F.2d 1011 (D.C. Cir. 1978) does not exist.

For example, the Court of Appeals noted that if permit limitations in existence when suit was filed were applied to past discharges then the number of violations of the no longer effective limitations[9] cited by Sierra Club would have been greatly reduced. "While the new permit had no retroactive effect," *Shell Oil*, 817 F.2d at 1174, n.5, App. at 11-12, n.5, the greatly reduced numbers of violations that would have occurred in the past had the new limitations been in effect demonstrates that those past violations did not suggest an ongoing problem. That is, the past violations, when considered in light of current permit limitations, did not support the Sierra Club's assertions that the discharger was "in violation."

The alternative interpretation of "in violation" pressed by the Sierra Club and relied upon by the Court of Appeals in *Gwaltney*—that citizen suits can be for solely past violations—ignores the plain language of the statute.[10] Straining to find ambiguity where there is none, *Gwaltney* relies on a false analogy to the tax laws to conclude that it is plausible to say that one is "in violation" and continues "in violation" by having once "violated." *Gwaltney*, 791 F.2d at 309, n. 10. As demonstrated by the court in *Pawtuxet Cove*, this argument analogy is "forced and the analogy inapt." 807 F.2d at 1092.

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[9]The permit conditions referred to were changed by EPA because they were recognized as being unrealistic and overly stringent. *Shell Oil*, 817 F.2d at 1174, n.5, App. at 12, n.5. It should be recognized that EPA has very limited authority to liberalize an effluent limitation. See 40 C.F.R. § 122.44(l).

[10]Had Congress intended 33 U.S.C. § 1365(a)(1) to apply to persons beyond those who are presently "in violation," it would have easily been made to read "who is alleged to be, *or to have been*, in violation." See *Pawtuxet Cove*, 807 F.2d at 1092.

The interpretation set forth in the *Hamker, Sierra Club* and *Pawtuxet Cove* opinions is the only interpretation that is consistent with the language, legislative history, and structure of the Clean Water Act. Moreover, as shown below, this interpretation avoids serious constitutional problems involving the citizen suit provision that would arise if citizens were authorized to sue to collect civil penalties for violations that ceased prior to commencement of the lawsuit.

C. The CWA Legislative History Supports the Decision Below.

Courts assume that the legislative intent is expressed in the ordinary meaning of the words used in the statute.[11] *United States v. Locke,* 471 U.S. 84, 95 (1985); *United States v. Rodgers,* 466 U.S. 475, 479 (1984); *Richards v. United States,* 369 U.S. 1, 9 (1962). Hence, courts should refuse to consider the applicable legislative history when the statute is "plain and unambiguous on its face." *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 187, n.33 (1978); *Rubin v. United States,* 449 U.S. 424, 430 (1981); *United States v. Oregon,* 366 U.S. 643, 648 (1961); *FAIC Securities, Inc. v. United States,* 768 F.2d 352, 361-362 (D.C. Cir. 1985).

There can be no doubt that some courts have strayed from this rule of construction, but doing so entails the risk

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[11]In fact, Senator Muskie, on whose statements the court in *Gwaltney* relied in reviewing the legislative history, stated that the Conference Committee had "tried . . . not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of the Congress." A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973) p. 164 (hereinafter CWA Legis. Hist.).

that the lawmaking process will be compromised. This Court has recognized that reference to legislative history where the statute is clear "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan v. Wald*, 468 U.S. 222 (1984). See also *Eagle-Picher Industries v. EPA*, 759 F.2d 922, 929 n.11 (D.C. Cir. 1985). Dissatisfied legislators or interest groups can place in the legislative history statements which can later be used to influence the courts to interpret language to their favor, but contrary to the intent of Congress as a whole. See *National Small Shipments v. Civil Aeronautics Board*, 618 F.2d 819, 828 (D.C. Cir. 1980).

Even though the plain language of the statute appears to settle the question of what Congress meant by "in violation," if the Court desires to look to the legislative history, it should do so only to determine "whether there is 'clearly expressed legislative intention' contrary to the language, which would require us to question the strong assumption that Congress expresses its intent through the language it chooses." *I.N.S. v. Cardoza Fonseca*, — U.S. —, 107 S.Ct. 1207, 1213, n.12 (1987). See *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, — U.S. —, 107 S.Ct. 1855, 1859-60 (1987). This is a step to be taken cautiously. *U.S. v. Locke*, supra, 471 U.S. at 96 quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982).

Where the statutory language is clear, the party wishing to alter the clear meaning by using legislative history bears a great burden. "(T)he plainer the statutory lan-

guage, the more explicit, convincing and reliable the contrary legislative history must be to persuade a court to follow the indications in the legislative history." *Monterey Coal v. Federal Mine Safety & Health Review*, 743 F.2d 589, 595 (7th Cir. 1984). See also *Garcia v. United States*, 105 S.Ct. 479, 482-83 (1984); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985). As will be shown below, the legislative history of § 1365(a)(1) not only fails to rebut the clear language of the statute, but convincingly supports the literal interpretation of the statute.

The legislative history of the CWA makes it clear that Congress' intent was to limit citizen suits to actions seeking to "*abate*" an ongoing violation. Committee reports from both the House and the Senate, as well as excerpts from the Senate debate on the bill, expressly refer to the citizen suit provision as providing a cause of action to *abate* violations, with injunctions and civil penalties available as remedies to achieve the abatement.[12]

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[12] The Senate Committee Report, in reviewing Section 505, refers to *abatement* as the goal of the citizen suit, and does not mention past violations as a basis for suit. In the discussion of the intent of Section 505(a)(1), the Report mentions "abatement" numerous times: "if the agency had not initiated *abatement* proceedings . . . the citizen might choose to file the action." (CWA Legis. Hist. p. 1498). "Whether *abatement* is sought by an agency or by a citizen. . ." (*Id.* at 1498). "None of these points (concerning class actions) is appropriate in citizens suits seeking *abatement* of violations. . ." (*Id.* at 1499). "This should extend (award of costs and fees) to plaintiffs in actions which result in successful *abatement* but do not reach a verdict." (*Id.* at 1499).

(Continued on following page)

Further indications of Congress' intent in Section 505 of the CWA can be found in the legislative history of the Clean Air Act (CAA), 42 U.S.C. § 7401 *et seq.* The citizen suit provision of the CAA served as the guide for the citizen suit language of the CWA. *Middlesex County Sewerage Authority v. National Sea Clammers,* 453 U.S. 1, 17 n.27 (1981); *Natural Resources Defense Council v. Train,* 510 F.2d 692, 699 (D.C. Cir. 1974); CWA Legis. Hist. at pp. 820 and 1497. The CWA added the additional remedy of civil penalties, but did not change the "alleged to be in violation" language of the CAA citizen suit provision. As does the history of the CWA, the CAA's legislative history emphasizes that the purpose of the citizen suit provision is to *abate* violations and not to permit actions against violations that are not ongoing.[13]

(Continued on following page)

The Conference Committee adopted the Senate provision, except to recommend two changes to Section 505 unrelated to "in violation". The lack of attention to this issue is indicative that Congressional intent is properly represented by the clear language of the statute. *Monterey Coal,* supra, 743 F.2d at 598.

[13](i) The Clean Air Act Conference Committee Report states: "The conference agreement authorizes citizen suits against polluters to *abate* violations. . . This should extend to plaintiffs in actions which result in successful *abatement*. . ." A Legislative History of the Clean Air Amendments of 1970 (1974) p. 136 (hereinafter CAA Legis. Hist.).

(ii) The Statement of the Managers on the Part of the House (on the Conference results) states: "The House bill did not include a provision for citizen suits. The Senate amendment authorized citizen suits against violators . . . to seek *abatement* of such violations." (CAA Legis. Hist. p. 205).

(iii) The Senate Report discussion of intent uses the *identical* language found in the Clean Water Act Senate Report, clearly referring to the citizen suit provision as on seeking *abatement* of violations. Compare the CWA Legis. Hist. at p. 497, with CAA Legis. Hist. at p. 437.

In its attempt to alter the clear language of the statute, the *Gwaltney* court cites principally two of Senator Muskie's comments upon presentation of the Conference Committee Report to the Senate. These excerpts fall far short of the required "explicit, convincing and reliable" type of legislative history needed to alter clear, unambiguous statutory language.

Even though Muskie is considered as "perhaps the Act's primary author," *E.I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 129 (1977), his statements do not represent any formal report concurred in by other members of Congress, but are only his personal comments. The statements of a single legislator, even the sponsor of a provision, are not controlling in analyzing the legislative history.[14] *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 118 (1980); *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979); *Dubois v. Thomas,* 820 F.2d 943, 947 (8th Cir. 1987). *cf. United States Department of State v. Washington Post Co.,* 456 U.S. 595, 600-601 (1982). ("Passing references and isolated phrases are not controlling when analyzing a legislative history . . . . [T]here surely would be clear suggestions in the legislative

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[14]Both the Fifth and Eighth circuits in other cases have found Senator Muskie's statements interpreting the CWA to be contrary to the intent of Congress. In the first sentence of the same paragraph of his oral statement in which he says that citizens can file suit against one alleged "to have been" in violation, Senator Muskie stated that the Administrator had a non-discretionary duty to issue an abatement order whenever an NPDES permit violation occurred. (CWA Legis. Hist. at p. 163). The Fifth and Eighth Circuits have since ruled that the intent of Congress was that the issuance of such orders be discretionary. *Sierra Club v. Train,* 557 F.2d 485 (5th Cir. 1977); *Dubois v. Thomas,* 820 F.2d 943 (8th Cir. 1987).

history" if a meaning other than the normal meaning of the word were intended).

Additionally, the circumstances of the delivery of Muskie's statements weaken their weight. His only statement regarding solely past violations was never actually spoken to the Senate but is found in a written statement entered into the record as an addendum to his spoken comments.[15] His oral remarks were substantially less favorable for the Sierra Club position as they indicated that a citizen suit may be based upon only "continuous and intermittent" violations.[16] The House, which voted on the final bill the same day that Muskie made his statement to the Senate, did not have the opportunity to hear the remarks or read the statement entered into the Congressional record. As such, his statement is of limited weight. See, e.g., *National Association of Greeting Card Publishers v. United States Postal Service,* 462 U.S. 810, 832 n.28 (1983).

The Sierra Club also argues that recent legislative statements and amendments to the CWA support its position. Such statements and legislative history are of questionable worth. "What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment." *Rogers v. Frito-Lay, Inc.,* 611 F.2d 1074, 1080 (5th Cir. 1980); see *American Mining Congress v. EPA,* slip op., Dkt. No. 85-1206 (D.C. Cir. July 31, 1987),

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[15]See CWA Legis. Hist. pp. 163-164, 179.

[16]CWA Legis. Hist. p. 163. "Intermittent" indicates a substantial degree of regularity and continuity in the specific violations.

Lexis at 19; "Subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Commission v. GTE Sylvania, Inc., supra,* 447 U.S. at 118 n.13. Therefore, the recent amendments to the CWA are entitled to little, if any, weight in evaluating Congress' intent in passing the prior legislation.

Moreover, the legislative history of the Water Quality Act of 1987 relied on by the Sierra Club does not support its strained interpretation of "in violation." It is clear that Congress believes that the *government* can seek relief for purely past violations of a permit condition, but as shown below, a *citizen's* authority to seek relief under the citizen suit provision is not coextensive with the government's authority to enforce civil penalties.

The Sierra Club and the *Gwaltney* court have failed to show that the legislative intent differs from the clear statutory language. *Gwaltney* should be reversed and certiorari denied in this case.

D. A Citizen's Authority to Enforce the Clean Water Act Is Not Coextensive with that of the Government.

The Sierra Club and the *Gwaltney* court argue that citizen enforcement authority under the CWA is coextensive with that of the government. Their reasoning is that the government is empowered to enforce the CWA, including the civil penalty provision (§ 1319(d)), by § 1319(b), which in turn incorporates the standard of § 1319(a), which authorizes the government to institute an enforcement action against anyone "in violation of any condition or limita-

tion . . ." *See* Petition at 16, *see also Gwaltney,* 791 F.2d at 309.

The Sierra Club's and *Gwaltney's* reliance on Section 1319(d) is totally misplaced. As pointed out by this court in *Tull v. United States,* — U.S. —, 107 S.Ct. 1831, 1839 (1987):

> Section 1319 does not intertwine equitable relief with the imposition of civil penalties. Instead, each kind of relief is separably authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties.

That is, the language of subsections 1319(a) and 1319(b) refers only to *injunctive* relief and administrative compliance orders, and that language does not provide the jurisdictional basis for governmental enforcement of civil penalties. On this issue, even the government, which supports affirmance of *Gwaltney* for factual reasons, agrees with our position and points out in its Amicus brief in *Gwaltney* at 20-21 that jurisdiction for the government to enforce the civil penalty provision, Section 1319(d), is provided by 28 U.S.C. 1345 and 1355.

By contrast, the citizen suit provision is the sole authority for a citizen to seek an injunction or civil penalties. As compellingly stated by the Government, "[t]he marked divergence between the language of Section 309 [Section 1319] and that of Section 505 [Section 1365] persuasively demonstrates that Congress gave the government—but not private citizens—the power to seek civil penalties for wholly past violations." Brief for the United States at 21, n.33.

That citizen enforcement is not coextensive with government enforcement authority is also shown by the requirements of § 1365 that the plaintiff be adversely affected, that the plaintiff has given the required sixty day prior notice of the alleged violation, and that the citizen be precluded from commencing suit if EPA or the State already commenced a suit to require compliance.[17]

The Sierra Club is concerned that preventing citizen groups from suing for penalties for solely past violations will impair the uniformity of the enforcement scheme that Congress sought to create under the CWA. Just the opposite is the case. Congress intended for EPA to be the primary enforcer of the CWA because EPA has substantial expertise in judging compliance with water pollution control effluent limitations. This expertise allows EPA to recognize that the mere existence of occasional exceedences of a permit limitation does not necessarily represent a pattern of violations.

All of the NPDES permits involved in the six cases in this matter were written to achieve the level of pollution control achievable through application of best practicable control technology currently available ("BPT"). The method utilized by EPA for establishing these BPT permit effluent limitations was to look at the performance of the best performing pollution control technology. As described by the court in *Marathon Oil v. Environmental Protection Agency*, 564 F.2d 1253, 1266 (9th Cir. 1977):

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[17]Thus, the citizen suit provision was not intended to displace the role of government enforcement, but rather to ensure that people being adversely affected by violations of a permit could obtain relief through the courts if the discharger failed to remedy the violations or if the government failed to take enforcement action.

> In computing a standard based on a "confidence interval" of, say, 99%, the EPA determines a mg/l standard that the effluent discharge data from an exemplary plant can be expected to fall inside of 99% of the time.

Typical "confidence intervals" were 99% for daily maximum effluent limitations and 95-97% for daily or monthly average effluent limitations.[18]

As recognized in *American Petroleum Institute v. Environmental Protection Agency,* 661 F.2d 340, 350 (5th Cir. 1981), BPT presumes occasional exceedences:

> The record proves that upsets and bypasses are as much a part of BPT as modern equipment and technological data. Despite best efforts at compliance, even a facility employing the best available equipment will occasionally exceed discharge limitations.

See also *FMC Corporation v. Train,* 539 F.2d 973, 986 (4th Cir. 1976).

Thus, EPA would *expect* even the best available system to be in violation of the standards some percentage of the time. Therefore, a plant that occasionally fails to meet a given standard is performing as well as EPA expects under BPT technology. Thus, while permits on their face require 100% compliance, the courts have held that 100% compliance cannot be achieved and is not expected.

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[18]These confidence intervals are for each pollutant being limited, thus are applicable to each parameter at each outfall and not for the overall performance for every parameter at all outfalls. Contrary to the representations of Petitioners' counsel, the *Shell Oil* decision did not approve a 95% compliance standard for NPDES permits. The Fifth Circuit simply emphasized that a review of the companies' compliance records only demonstrated the presence of "occasional" exceedences and not continuing violations. *Shell Oil,* 817 F.2d at 1173-1174, App. pp. 11-12. Sierra Club's "arsenic violation" analogy (Petition at p. 24, n.17) is thus completely misleading and erroneous.

EPA can use its expertise and discretion in deciding whether or not to prosecute a company which might exceed a permit limitation, keeping in mind that occasional exceedences of permit limitations in the past do not necessarily constitute an ongoing violation, but rather reflect the method the EPA employed in determining effluent limitations and the limitations of control technology and measurement techniques. Citizen groups on the other hand, do not bring this same expertise to focus in determining whether a violation has occurred. The statutory language limiting citizen suits to cases in which the defendant is alleged "to be in violation" of an effluent limitation, therefore, plays a role similar to EPA's prosecutorial discretion.

E. The First and Fifth Circuits' Interpretation of the Words "In Violation" Is Required to Avoid Serious Constitutional Questions.

The First and Fifth Circuits' interpretation of the words "in violation" is required to avoid serious questions about the constitutionality of the Citizen Suit provision. The Sierra Club and *Gwaltney* interpretation that these words permit a suit for civil penalties payable to the United States Treasury for violations that have ceased prior to the filing of a complaint would render the citizen suit provision of dubious constitutionality under the standing requirements of Article III.

The question of whether a plaintiff has standing involves both constitutional and prudential limitations. While Congress may, by legislation, expand standing to the full extent permitted by Article III,[19] "(i)n no event, however,

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[19]For purposes of discussion, we will assume that Congress intended to expand standing to the full extent permitted by the Constitution.

may Congress abrogate the Art. III minima . . .'' *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979). The Article III constitutional limitations on standing involve three separate but related components: 1) There must be a ''distinct and palpable'' injury to the plaintiff, *Warth v. Seldin,* 422 U.S. 490, 501 (1975), rather than an alleged injury which is ''abstract,'' ''conjectural,'' or ''hypothetical,'' *Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983). 2) The injury ''must be 'fairly' traceable to the challenged action.'' *Allen v. Wright,* 468 U.S. 737, 751 (1984). 3) There must be a ''substantial likelihood'' that the relief requested will redress or prevent the injury. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

Here, we will focus on the redressability requirement. The question is whether any relief allowed under the citizen suit provision can redress or prevent injury to the Sierra Club or its members fairly traceable to the challenged action of a discharger who has ceased being ''in violation'' by the time suit is filed.

It is clear that the citizen suit provision can provide two types of remedy—injunctive relief ''to enforce such an effluent standard or limitation'' and civil penalties payable

to the U.S. Treasury. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 n.25 (1981). Neither of these types of relief can possibly redress or prevent any injury caused by violations of effluent standards or limitations which have already ceased when suit is brought.[20]

The plaintiffs could be made whole for any injury caused by violations in the past by damages payable to them; but damages are not available under the citizen suit provision. If the discharger is in violation when suit is filed, the plaintiff would have standing to seek an injunction and civil penalties payable to the Treasury because of the concrete threat of resumed violations. But the Sierra Club and the *Gwaltney* court would allow actions to be brought even where the violations have been remedied.

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[20]If the violations were ongoing, injunctive relief obviously would provide relief and would easily meet the redressability requirement. We also believe that civil penalties payable only to the U.S. Treasury for ongoing violations would meet the redressability requirement—even when the magnitude of those penalties is determined, in part, by the number of violations in the past. That the violations are ongoing would give the plaintiffs a personal stake in the outcome of the litigation, and the existence of a personal stake is the essence of the standing requirement. *See Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, civil penalties are available for past violations when—and only when—those past violations are part of the ongoing violations of the particular effluent limitation.

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CONCLUSION

For the reasons set out above, this Court should deny the writ requested.

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In The

Supreme Court of the United States

October Term, 1987

SIERRA CLUB,

Petitioner,

v.

SHELL OIL COMPANY,

Respondent.

SIERRA CLUB,

Petitioner,

v.

MONOCHEM, INC.,

Respondent.

SIERRA CLUB,

Petitioner,

v.

COPOLYMER RUBBER AND CHEMICAL CORP. *et al.*,

Respondent.

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TABLE OF CONTENTS

Page

Introduction 1

Argument 1

I. The Fifth Circuit Is The Only Court That Has Read The Strict Liability Standard Out Of The Clean Water Act. 1

II. The District Court's Power To Impose Penalties In Permit Enforcement Cases Is The Same Whether The Case Is Brought By The Attorney General Or By A Private Attorney General. 4

III. The Cases Below Should Be Reversed Even If *Gwaltney* Is Reversed. 5

IV. The Citizen Suit Provision Is Not Unconstitutional. 7

1. Cases On The Separation Of Powers. 7

2. The Separation Of Powers Cases Are Irrelevant In This Case. 8

a. The People Are Not An Agent Of Congress. 8

b. The Citizen Suit Provision Gives Persons The Right To Sue For Injuries To Their Own Interests. 9

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES

Bowsher v. Synar, 106 S.Ct. 3181 (1986) 7, 8, 9

Buckley v. Valeo, 424 U.S. 1 (1976) 7, 8, 9

California v. Department of the Navy, No. 86-1972 (9th Cir.) 5

Chesapeake Bay Foundation and NRDC v. Bethlehem Steel Corporation, 608 F. Supp. 440 (D.Md. 1985) 2, 6

Connecticut Fund for the Environment and NRDC v. Job Plating Company, 623 F. Supp. 207 (D. Conn. 1985) 2, 6

EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976) 1

Gwaltney v. Chesapeake Bay Foundation and Natural Resources Defense Council, No. 86-473 ..... 1, 5, 6, 10

Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985) 6

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 10

Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) 2, 6

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 6

Sierra Club v. Morton, 405 U.S. 727 (1972) 9

Sierra Club v. SCM Corporation, 747 F.2d 99 (2nd Cir. 1984) 9, 10

Sierra Club v. Shell Oil Co., 817 F.2d 1169 (5th Cir. 1987) ..... *passim*

Sierra Club v. Union Oil Company of California, 813 F.2d 1480 (9th Cir. 1987) 3

TABLE OF AUTHORITIES—Continued

Page

SPIRG v. AT&T Bell Laboratories, 617 F. Supp. 1190 (D.N.J. 1985) 9

SPIRG v. P.D. Oil and Chemical, 627 F. Supp. 1074 (D.N.J. 1986) 10

State of New York v. Shore Realty Corporation, 759 F.2d 1032 (2d Cir. 1985) 2

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) 2, 3

United States v. Kubrick, 444 U.S. 11 (1979) 6

U.S. v. Ward, 448 U.S. 242 (1980) 1

Weyerhaeuser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) 2

STATUTES

28 U.S.C. § 2462 6

33 U.S.C. § 1319(c)(1) 3

§ 1319(d) 5

33 U.S.C. § 1323 5

§ 1365(a) 5, 9

§ 1365(b)(1)(B) 4

§ 1365(g) 9

Water Quality Act of 1986, Pub. L. No. 100-4, § 313(c) (1987), codified at 33 U.S.C. § 1319(d) 2

INTRODUCTION

This case raises the identical issue to that in *Gwaltney v. Chesapeake Bay Foundation and Natural Resources Defense Council, Inc.*, No. 86-473, scheduled for oral argument on October 5, 1987. Sierra Club urges this Court to grant the writ to allow the decision below to be modified in light of the decision in *Gwaltney*.

The decision below requires reversal no matter what the outcome in *Gwaltney*. The court below effected a radical shift in the law. It read the strict liability provision out of the Clean Water Act, and instead apparently required a citizen plaintiff in a civil action to prove the elements the government must prove in a criminal prosecution. The opinion below reversed the burden in a citizen enforcement case, contrary to the statute and the settled law in all other courts.

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ARGUMENT

I. The Fifth Circuit Is The Only Court That Has Read The Strict Liability Standard Out Of The Clean Water Act.

The fundamental error of the Fifth Circuit in the cases below was to remove from the Act strict liability for violating an NPDES permit. Until the court decided the case below, it was a simple matter to determine whether a polluter was liable. If he had violated his permit, he had violated the Act. *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). The defendants' own discharge monitoring reports were used to establish liability. *U.S. v. Ward*, 448 U.S. 242, 251-55 (1980).

All the District and Circuit Courts except those in the Fifth Circuit, have found that liability is judged on a strict liability basis. The reason is simple. The Act's permit requirements "were written without regard to intentionality . . . making the person responsible for the dis-

charge of any pollutant strictly liable." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).[1]

The reason Congress wrote the Act with a strict liability standard is straightforward: to make permit enforcement simple, certain and swift. As the D.C. Circuit put it, permits could not be enforced if enforcement "depend[ed] on murky determinations concerning the sequence of events in the plant, whether those events would have been avoidable if other equipment had been installed . . ." and so on. *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1058 (D.C. Cir. 1978).

What strict liability means is that a defendant's efforts, whatever they might have been, and the problems in its plant, whatever they were, are irrelevant to a judgment of liability. The only relevant question is whether the defendant has exceeded its permit; if it has, it is liable. Questions of good faith, reasonable efforts, and so on, are relevant to determining only the size of the penalty. See Water Quality Act of 1986, Pub. L. No. 100-4, § 313(c) (1987), codified at 33 U.S.C. § 1319(d). They do not arise when determining liability.

The Fifth Circuit would remove strict liability from the Act. Under the guise of determining whether the defendant is "in violation" at the time of suit, the Fifth Circuit requires that a demonstration be made that violations are the "product of [defendant's] systematic neglect of discharge limitations or of inadequate pollution control facilities." 817 F.2d 1169 at 1173, 74. This is precisely the "murky determination" that the D.C. Circuit, in *Weyerhaeuser*, said would make permit enforcement unworkable. It would.

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1. See also *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374-77 (D.C. Cir. 1977); *State of New York v. Shore Realty Corporation*, 759 F.2d 1032, 1042 (2d Cir. 1985); *Chesapeake Bay Foundation and Natural Resources Defense Council v. Bethlehem Steel Corporation*, 608 F. Supp. 440, 451-53 (D.Md. 1985); *Connecticut Fund for the Environment and Natural Resources Defense Council v. The Job Plating Company*, 623 F. Supp. 207, 218 (D.Conn. 1986).

This error is perhaps most clearly illustrated in the following way. There is a narrow exception to strict liability for permit violations known as the "upset" defense. Codified at 40 C.F.R. 122.41(n)(1), the burden is explicitly placed on a defendant to show, as part of the defense, that its violations were not caused by "operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or careless or improper operators". Yet these are just the kinds of things—"systematic neglect"—that the court would make a plaintiff show before liability could attach. The court below has reversed the statutory burdens.

The court below strikes the strict liability standard from the Act for citizen suits, and requires some vaguely defined demonstration of willfulness or negligence. Willful or negligent conduct, however, is separately punishable under the Act with criminal penalties. 33 U.S.C. § 1319(c)(1). See also *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Citizens, of course, may not bring criminal actions under the Act. Yet the showing that the court below requires a citizen plaintiff to make in a civil suit sounds like that required for a criminal prosecution.

A model of how to read the Act's enforcement scheme, which directly conflicts with the decision below, is provided by a recent Ninth Circuit case. In *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480 (9th Cir. 1987), the district court had engaged in a trial, much along the lines required by the court below. It had excused all the defendant's violations. The Ninth Circuit reversed on all grounds, and held Union Oil liable for all alleged violations, by comparing its discharge monitoring reports to its permits.

What the Ninth Circuit said of one excuse—sampling error—applies to all the excuses allowed by the court below:

> Were we to accept Union Oil's argument regarding the use of sampling errors to excuse reported permit exceedances, we would be sanctioning countless additional hours of NPDES litigation and creating

> new, complicated factual questions for district courts to resolve. As indicated by the legislative history, Congress hoped to limit such situations. In addition, if each self-monitoring report is to be considered only prima facie rather than conclusive evidence of an exceedance of a permit limitation, citizen groups like the Sierra Club would be taking a considerable risk whenever they initiated a citizen enforcement action pursuant to 33 U.S.C. § 1365. While a permittee's publicly filed reports might clearly indicate that illegal pollution was taking place, the permittee might have additional information unavailable to citizen groups indicating that sampling error rendered the reports meaningless. Finally and most importantly, allowing permittees to excuse their reported exceedances by showing sampling error would create the perverse result of rewarding permittees for sloppy laboratory practices. Such an approach would surely undermine the efficacy of the self-monitoring program.

813 F.2d at 1492. The Ninth Circuit has read the Act correctly; the Fifth Circuit has rewritten it.

II. The District Court's Power To Impose Penalties In Permit Enforcement Cases Is The Same Whether The Case Is Brought By The Attorney General Or By A Private Attorney General.

The court below moved from the observation that citizens do not have the full enforcement powers of the government to the conclusion that in citizen suits—and only in citizen suits—the court must hold a trial to judge whether the defendant is "in violation" at the time of suit. This is a non sequitur.

Sierra Club has never argued that the citizen suit contains the full armamenterium of enforcement powers available to the federal government. Citizens cannot bring criminal actions or issue administrative orders. They must give 60 days notice of intent to sue and demonstrate standing. The government may preclude a citizen suit by filing an action in court during the 60-day notice period.[2]

2. In such a case the citizen may intervene as of right. 33 U.S.C. § 1365(b)(1)(B).

So much is obvious. But these restrictions say nothing about the powers of the district court in a properly commenced citizen enforcement action.

Once a citizen has given notice, filed an action, and shown standing, the district court has precisely the same power to impose penalties in a permit enforcement case brought by the government or by a citizen. This could not be more straightforward in the statute. Section 309(d) of the Act, 33 U.S.C. § 1319(d), authorizes the court to impose penalties in a government action against one who "violates" the Act. The citizen suit provision, empowers the court to impose "*any* appropriate civil penalties under [Section 309(d) of the Act] Section 1319(d)." Section 505(a) of the Act, 33 U.S.C. § 1365(a) (emphasis added). The statute could not be clearer. *The remedies in permit enforcement cases, whether brought by the attorney general or private attorney are the same.*[3]

III. The Cases Below Should Be Reversed Even If Gwaltney Is Reversed.

Even if this Court decides that the Fourth Circuit is in error in *Gwaltney v. Chesapeake Bay Foundation and Natural Resources Defense Council*, No. 86-473, the decision below should be reversed. Although it is not obvious in reading respondents' opposition to the petition for certiorari, or in reading the opinion below, every one of the respondents violated its permit *both before and after* the re-

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3. In its amicus brief in *Gwaltney*, the United States has argued that the district court has the power to impose penalties in citizen suits only if there is an allegation of an ongoing violation. Because the United States has facilities throughout the country subject to NPDES permits, it is a potential defendant. See 33 U.S.C. § 1323. It is understandably not enthusiastic about the power the district court has in citizen actions. One such action illustrates the problem. California, as a citizen, sued the Navy for violating a permit involving discharges into San Francisco Bay. The Navy maintains that it ceased discharges just prior to suit, and that California knew the violations would not continue. The United States thus claims that the district court lacks jurisdiction over its actions. The district court dismissed the action, California appealed, and the Ninth Circuit is awaiting the outcome of *Gwaltney*. *California v. United States Department of the Navy*, No. 86-1972 (9th Cir.).

spective complaints were filed; several violated during the month the complaint was filed. Even if this Court reverses *Gwaltney*, and holds that some "continuing" violation is required for liability to attach, companies that violate their permits before and after the complaints are filed must be held liable for those violations, without a trial to determine whether the violations after the filing were produced by the same "cause" as the violations before filing.

Sierra Club believes that a polluter may be held liable for penalties under the Act until the statute of limitations expires. When one has committed a proscribed act, whether breach of contract, commission of a tort, or falsification of a tax return, one is potentially liable and remains potentially liable until either the delict is cured by penalties, damages, a prison term or some other remedy, or the statute of limitations has expired. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944).

The same is true of the civil penalty remedy under the Clean Water Act. One holds a permit, which makes it a requirement of federal law to discharge no more than a certain amount of specific pollutants. If one exceeds those amounts, one is potentially liable for the imposition of a civil penalty payable to the United States Treasury in a suit brought by the government or by a private attorney general until the statute of limitations has run out.[4]

The errors in the opinion below trace their origin to an earlier Fifth Circuit decision, *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). In an attempt to bar the plaintiffs' state law damage claims, the panel in *Hamker* applied the notion appropriate for

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4. District courts in the Second and Fourth Circuit have agreed with Sierra Club's argument that the applicable statute of limitations is prescribed at 28 U.S.C. §2462, and is five years. *See, e.g., Connecticut Fund for the Environment and NRDC v. Job Plating Company*, 623 F. Supp. 207, 211-13 (D.Conn. 1985) and *Chesapeake Bay Foundation and NRDC v. Bethlehem Steel Corporation*, 608 F. Supp. 440, 446-50 (D.Md. 1985).

injunctive remedies—continuity in violation—instead of the standard appropriate to penalties and all other non-injunctive relief in American law—whether the statute of limitations has expired. The court below broadened *Hamker's* mistaken "continuing violation" requirement to effect a radical change in the statute.

IV. The Citizen Suit Provision Is Not Unconstitutional.

1. Cases On The Separation Of Powers.

Two recent cases of this Court explore the separation of powers doctrine: *Buckley v. Valeo,* 424 U.S. 1 (1976), and *Bowsher v. Synar,* 106 S.Ct. 3181 (1986).

Both *Buckley v. Valeo* and *Bowsher v. Synar* involve variations on the problems of whether the Congress can by statute give executive powers to persons that it and not the President appoints to office. In *Buckley v. Valeo,* the separation of powers problem centered on a provision of the Federal Elections Campaign Act. The statute created a Federal Elections Commission with broad powers of adjudication, rulemaking and enforcement. The Commission was made up of eight persons, of which only two were appointed by the President. This Court found that this structure was unconstitutional. The essential reason was that executive functions created by the statute were to be carried out by persons who were the designees of Congress.

With respect to the institution of civil litigation to enforce the statute, the sole prosecutorial discretion was vested in the Commission. Congress in effect was both writing and enforcing the law. *Buckley v. Valeo* decided that Congress may not pass a statute that creates public law, and vests enforcement of that public law exclusively in the hands of its own appointed officials.

Bowsher v. Synar, 106 S.Ct. 3181 (1986), addresses whether Congress can delegate to the Comptroller General, an official appointed by and dismissable by Congress, the power to designate mandatory cuts in the federal budget. For reasons analogous to those in *Buckley v. Valeo,* this Court held that the delegation to the Comptroller General

was unconstitutional because it allowed the Congress to retain control over a decision that was inherently executive. 106 S.Ct. at 3192.

Read together, *Buckley v. Valeo* and *Bowsher v. Synar* stand for the proposition that under the Constitution Congress has the power to pass laws. It has neither the power to enforce them in court, nor execute them, through officers whom it appoints.

2. The Separation Of Powers Cases Are Irrelevant In This Case.

Buckley v. Valeo and *Bowsher v. Synar* are without application to the citizen suit provision of the Clean Water Act. There are two reasons. First, citizens are not agents appointed and dismissable by Congress, but entirely independent actors. Second, and more fundamentally, citizens under the citizen suit provision do not sue to enforce what *Buckley v. Valeo* calls "public law." They sue instead to vindicate statutory rights that they have as individuals.

a. The People Are Not An Agent Of Congress.

Both *Buckley v. Valeo* and *Bowsher v. Synar* stress the degree of control that Congress retained over the persons to whom it had delegated duties to carry out or enforce the law. The question in each case was whether it had retained too much control over execution or enforcement of the law; the answer in each was yes, because the persons executing or enforcing the law were dependent for their offices upon Congress. Nothing could be further from these facts than the present case. It would be absurd to say that citizens are answerable to Congress in such a way that Congress has arrogated to itself the civil enforcement power under the Clean Water Act.

On the contrary, the executive can issue administrative enforcement orders, can bring criminal actions, can bring civil actions, can preclude citizen suits by filing first, and can intervene in any civil action brought by a citizen. 33 U.S.C. §§ 1319; 1365. Unlike the situation in *Buckley*

v. Valeo, Congress had hardly arrogated to itself all of the civil enforcement powers that appropriately reside in the Attorney General. The Executive, not Congress, has them.

Moreover, the citizenry is not an agent of Congress as was the Federal Election Commission in *Buckley v. Valeo* or the Comptroller General in *Bowsher v. Synar.* To suggest that citizens are the agents of Congress is to get everything backwards.

b. The Citizen Suit Provision Gives Persons The Right To Sue For Injuries To Their Own Interests.

Perhaps the deeper reason that the respondents' argument is wrong is that it takes no account of what the citizen suit provision gives a citizen the right to do.

The citizen suit provision gives the right to bring a civil action to a citizen whose interests are or may be adversely affected by a defendant's pollution in violation of the law. 33 U.S.C. § 1365(a), (g). This statutory requirement of an individualized interest is connected with the standing requirements of the citizen suit provision. To have standing, a person must, for purposes of Article III, have a cognizable interest, whether aesthetic, environmental, recreational, or some other, in the resource for the protection of which he institutes suit. *Sierra Club v. Morton,* 405 U.S. 727 (1972); *Sierra Club v. SCM Corporation,* 747 F.2d 99, 105-107 (2nd Cir. 1984).

In other words, the citizen suit provision gives individual persons the right to sue "*on his own behalf,*" Section 505(a) of the Act, 33 U.S.C. § 1365(a) (emphasis added), those who pollute waters with which the person bringing the suit has some real connection. Plaintiffs in a permit enforcement suit are the beneficiaries of a legislative grant of standing. Congress intended both general and specific deterrence to result from permit enforcement, and citizen plaintiffs benefit, with the other members of the public, from a successful prosecution. *SPIRG v. AT&T Bell Laboratories,* 617 F. Supp. 1190, 1200 (D.N.J. 1985);

SPIRG v. P.D. Oil and Chemical, 627 F. Supp. 1074, 1083 (D.N.J. 1986). Put differently, citizens may not sue on some theory of public law: if I live in Maryland, I may not sue a polluter in Texas merely because he is violating the law. Some showing of a personal interest adversely affected would be required. *Sierra Club v. SCM Corporation*, 747 F.2d 99, 105-107 (2nd Cir. 1984).

That persons are suing in their own behalf is a complete answer to the respondents' argument. Congress can create a statutory right, the violation of which gives rise to standing to sue for the vindication of the right. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). It has given such a right and the opportunity for redress in the Clean Water Act.

CONCLUSION

Because the opinion below requires reversal no matter what the outcome in *Gwaltney*, this Court should grant the writ requested.

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